

P E D I G R E E

O F

SIR ROBERT GORDON, BARONET.

ADAM GORDON, second Son of George second Earl of Huntly, by a Daughter of James I. King of Scotland, created Earl of SUTHERLAND by King James V. Proved by Royal Charters, Acts of Council, private Deeds, Histories of Peerages, &c. He married Elizabeth, Daughter of John Earl of Sutherland—He died in the Beginning of the Year 1538.

ALEXANDER Master of Sutherland, eldest Son of Earl Adam. Proved by Royal Charters, Anno 1527, &c. He died before his Father, leaving his eldest Son,

JOHN Earl of Sutherland.—He is the first Earl of Sutherland marked in the Rolls of Parliament, viz. Anno 1543. He got a Charter of the Earldom under the Great Seal 1546; was forfeited 1563, restored; and dying in 1567, was succeeded by his Son.

ALEXANDER Earl of Sutherland. Proved by Service as Heir to his Father John, 8 July 1573, and as Heir to Adam Earl of Sutherland, his Great-Grandfather.—He died in December 1594.

JOHN Earl of Sutherland, eldest Son of Earl Alexander. Proved by a Charter of the Earldom in 1580.—He obtained a Charter of the Earldom under the Great Seal, on his own Resignation, penult April 1601.—Died 13 September 1615.

JOHN Earl of Sutherland.—Proved by Retour as Heir to his Father John, 4 June 1616

GEORGE Earl of Sutherland.—Proved by Charter under the Great Seal, 21 February 1662, and 24 July 1681.—He died 1703.

JOHN Earl of Sutherland.—Proved by Charter under the Great Seal, dated 29 July 1706, &c.—Died 1733.

WILLIAM Lord Strathnaver.—Proved by said Charter under the Great Seal, dated 29 July 1706.—Died before his Father, 1720.

WILLIAM Earl of Sutherland.—Proved by his Service to his Father, 7th January 1723.—Died 6 November 1750.

WILLIAM Earl of Sutherland.—Proved by his Service as Heir to his Father, 18 November 1751.—Died 16 June 1761, leaving an only Child.

The Claimant Lady ELIZABETH GORDON, an Infant.

Sir ROBERT GORDON of Gordonston, Baronet, Earl Alexander's second Son, created Premier Knight Baronet of Scotland.—Proved by Charter under the Great Seal, penult April 1601, mentioning him to be Brother German to John then Earl of Sutherland Patent creating him Knight Baronet.

Sir LUDOVIC GORDON, eldest Son.—Proved by his Contract of Marriage, 18 November 1643.—Died in September 1685.

Sir ROBERT GORDON, eldest Son.—Proved by Retour, 21 September 1688.—He died 1704.

The CLAIMANT Sir ROBERT GORDON, now of Gordonston, Baronet, eldest Son.—Proved by Retour, 12 July 1705.

SUPPLEMENTAL CASE

O F

Sir ROBERT GORDON, Baronet,

(Claiming the Title and Dignity of)

E A R L of S U T H E R L A N D,

In which all Facts and Arguments in Support of his Claim are stated, and the Inaccuracies in his original Case and Appendix, (which were printed before the Proofs arrived from Scotland) are corrected.

WHEN the *Germans* conquered the different Provinces of the *Roman Empire*, the conquering General, or Prince, reserved certain Portions of the conquered Land for himself, and parcelled out other Parts among his Chieftans, under a Condition of military Service and Attendance in Council. The Proprietors of these last Estates were in most Parts of the Continent called Barons: In *Scotland* and *England* they were called *Thanes*. These *Thanes* judged and led to War the People upon their Estates. From the Nature of these Estates, they went to Males; because Males only could fulfil the Condition upon which the Grant had been made. A Woman Thane was as anomalous a Character as a Woman Bishop. Hence the Origin of Fiefs.

But the whole of the Land of the conquered Province was not so distributed or so held. The *Germans*, in none of their Conquests, assumed the Property of the whole Lands to themselves (a); for they dared not to drive the Conquered to despair; and the Superfluity would have been burdensome to the Conquerors. Many of the ancient Inhabitants then kept their Lands on the ancient allodial footing; and such of the new Intruders as were not attached to any Chieftain, taking possession of any vacant Land they found, enjoyed it on the same footing. But as it was necessary to reduce to subjection under Government, in a political, those who were not subjected in a feudal Capacity, the King sent his own Officers to judge, and to lead to War the Possessors of these last Lands, in the same Manner as the Chieftain judged and led to War the People dwelling upon the Lands which had been granted in a feudal Form to him. This Officer was in *Italy* called *Comes*; in *France*, *Count*; in *Germany*, *Greve*; and in *Scotland* and *England*, *Earl*; and his Depute in these two last Countries was called *Sheriff*. The *Earls* were merely Royal Officers, without any Connection with Land, further than that they (b) superintended those of the King's Subjects who did not live upon the Lands of the *Barons* or *Thanes*. The *Bishop* sat with the *Earl* in Court when he administered Justice (c). The *Earl's* Salary was the Third of the Fines of the Court (d); and during a long Period of Time the Office of *Earl* lasted only during the Pleasure of the King (e). Afterwards these Offices came to be made hereditary,

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(a) *L'Esprit des loix*, lib. xxx. cap. 8. and Authorities there quoted.

(b) Aut in hundredo coram domino hundredi, aut in comitatu coram comite, seu vicario ejus, quem Saxones *gereper* & *Scirgereper* vocabant Normanni vicecomitem, 5. LL. H. I. cap. 8. Spellman's Glossary, voce Comes, p. 143.

(c) Præsidebat autem foro comitatus non solus sed adjunctus episcopo, LL. Eadgari, cap. 5. LL. Canut. par. 2. c. 17. Spellman's Glossary, voce Comes, p. 140.

(d) Accipiebat autem comes cum inter Saxones, tum inter Anglo-Normannos, (veluti muneris stipendium) tertium comitatus denarium, hoc est multarum & emolumentorum regi ex placitis accrescentium. He gives many Authorities both in foreign Nations and at Home. Spell. Gloss. p. 141.

Two Sorts of People were bound to military Service; the great and lesser Vassals, who were obliged in consequence of their Fief; and the Freeman, whether *Franks*, *Romans* or *Gauls*, who served under the Count, and were commanded by him and his Officers.

The Name of Freeman was given to those who on the one Hand had no Benefices or Fiefs, and on the other were not subject to the base Services of Villainage; the Lands they possessed were what they called allodial Estates.

The Counts assembled the Freeman, and led them against the Enemy; they had Officers under them, who were called *Centenarii*; and as all the Freeman were divided into Hundreds, which formed what was called a Borough, the Counts had Officers under them, who were called *Centenarii*, and carried the Freeman of the Borough, or their Hundreds, to Field.

As Counts carried the Freeman against the Enemy, the feudal Lords carried also their Vassals or Rear-Vassals; and the Bishops, Abbots, or their Advocates, carried likewise theirs.

In the Spirit of Laws, Books xxx and xxxi, the Distinction betwixt Lands and Offices in old feudal Times is clearly set out. Vide also History of feudal Property, Chap. 1st. Every Earl had a Barony annexed to his Earldom, and the Relief of an Earl appears to have been the same with that of a Baron, viz. One hundred Pounds, it may be supposed that he paid it on account of his Barony, which was a Land Estate, and not of his Earldom, which was an Office. Lord Lyttleton's Life of Henry II. Vol. ii. p. 213.

(e) Vide Spellman's Gloss. where he gives a curious Instance from the ancient Historian Asseus, of Alfred's Behaviour to his Earls, Gloss. p. 141. Nec aliter inter Saxones nostros ut liqueat ex Asseus Meneyense, ubi, comites perperam judicantes

tary, and were granted like all other Grants of the Times in the feudal Form, under a Condition of military Service, and of Attendance upon the King's Council.

Thus an *Earldom* went to Heirs Male, 1st, Because it was of the Nature of a *Fief*. And, 2dly, Because it was of the Nature of an Office.

The Books of the feudal Law were written in the Year 1170. By these Books Women were excluded from the Succession to all feudal Estates, whether in Lands or in Offices (*f*), unless they were specially called to them.

By the Salic Law (*g*), which was the Foundation of the *French*, and by the Laws of the *Angles* (*b*), which were the Foundation of the *English*, and perhaps of the *Scots* Law, Women were excluded from the Succession to Land Property. Such of the Laws of the other ancient northern Nations as admitted them the Succession to Land Property, confined their Succession to *allodial*, but excluded them from *feudal* Property.

This Exclusion of Female Succession, founded on the Nature of *Fiefs*, and of the great *feudal* Offices, and on the Books of *feudal* Law, affected even the public Successions; for in these, except in *Spain* (in which Kingdom, on account of the Inundations from *Africa*, the System introduced by the *German* Nations, had not the same Vigour that it had in neighbouring Countries) Females were overlooked in the earlier Ages throughout all *Europe* in public Successions.

The Remains of the ancient Exclusion of Women, is to be seen even at this Day in the awkward Way in which they are admitted to the Succession of Lands. For the *feudal* Principle of Primogeniture takes place in their Succession, but the Estate goes equally, according to the Law of Nature, among them all. The Remains of their Exclusion is so strong in *Scotland*, that the King, as *ultimus hæres*, will take the Son's Succession, dying without Issue or collateral Heirs, to the Exclusion of his Mother.

In all Questions of remote Antiquity, relating to *Property* or *Dignity*, the *feudal* Law is the leading Rule in *Scotland*.

All *Fiefs*, whether of Lands or great Offices, were originally unalienable. When Lands came into Commerce, Purchasers insisted, as a Part of the Bargain, that the Benefit of their Purchase should descend to their Heirs, whether Female or Male. Hence began Female Succession in Lands. But as *Earldoms*, and other *Peerages*, were never the Subjects of Commerce, the Law of Male Descent, founded in the Nature of *Fiefs* and *Offices*, continued in them.

The *feudal* Law was preserved longer (*k*) in its original Purity in *Scotland* than in *England*, or perhaps than in any Country in *Europe*, on account of its Remoteness from, and not having Intercourse with other Nations. Hence the Exclusion of Women from inheriting *feudal* Property, lasted longer in *Scotland* than in most other Countries.

By the Terms *hæredes sui*, or *hæredes inter ipsos*, in Limitations either of Lands or *Peerages*, were understood only the ancient Heirs (*l*), viz. *Heirs Male*. It required the Introduction of the Words *hæredes quoscumque*

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judicantes sic alloquitur Rex Aluredus: *Quapropter aut terrenarum potestatum ministeria quæ habetis illico dimittite aut sapientiæ studiis multo devotius docere, ut studeatis impero. Quibus verbis (inquit Asserus) perterriti comites præpositi ad æquitatis discendæ studium totis viribus se vertere nitebantur—Malentes insuetam disciplinam quam labor discere, quam potestatum ministeria dimittere.*

The Title of Duke was not known in *England*, until the 14th Century. The Title of Marquis is also late.—*Spell. Gloss. 3d Edit. p. 192.*

(*f*) *Lib. Feud. Lib. i. Tit. 1. N. 3. Hoc autem notandum est, quod licet filia, ut masculi, patribus succedant, tamen a successione feudi remouentur similiter et earum filii nisi specialiter dictum fuerit, ut ad eas pertineat.—Lib. Feud. Tit. 8. N. 1. Filia vero non succedit in feudo, nisi investitura fuerit facta in patre ut filii et filia succedant in feudo tunc, (enim succedit filia filiis non extantibus) vel nisi investita fuerint.—Lib. 2. Tit. 11. Ad filias vero seu neptis, proneptis, vel ex filia nepotes, seu pronepotes successio feudi non pertinet. Proles enim feminei sexus, vel ex femine descendens ad hujus modi successionem aspirare non potest: nisi ejus conditionis sit feudum, vel eo pacta acquisitum—Jatius Commentary—Craig, Lib. ii. Dieg. 14.*

(*g*) *De terra Salica nulla portio hæreditatis mulieri veniat sed ad virilem sexum tota terræ hæreditas perveniat.—Vide Sal. Tit. 62. Sect. 6.*

(*b*) *Hæreditatem defuncti filius, non filia suscipiat. Si filium non habet qui defunctus est, ad filiam pecunia et manerium Terra vero ad proximum paternæ generationis consanguineum pertineat. T. 6. Lex 1.*

(*i*) *Craig, Lib. i. Dieg. 8. N. 16. Quod si novus aliquis casus supervenerit, qui neque jure scripto neque consuetudine comprehendatur, neque ex iis quæ diximus dirimi potest, & casus illius decisio in jure feudali reperiatur, præferendum jus feudale, et juri pontificio, et juri Romano. Imo si exacte rem omnem æstimare velimus, hoc jus proprium hujus regni dici potest (si latius juris proprii nomen extendamus) cum ex ejus scaturigine et fontibus omne jus quod utimur in foro omnique usus et praxis defluerit, et si quid dubii oriatur origines semper repetendæ sunt, ut inde æquum est dignoscatur.*

(*k*) *Craig, de Feudis, Lib. i. Dieg. 8. N. 2. Hoc enim certissimum est, nos purius hoc jus habere quam vicinos rivulis aquarum, qui quo propiores sunt fonti five scaturigini, eo sunt puriores. Lib. 1. Dieg. 7. N. 1. Nostri purius jure utuntur, quam vicini eoque quod multo magis cum ipsis fontibus seu scaturigine conveniat.*

(*l*) *Craig, Lib. ii. Dieg. 14. N. 2. Itaque ex jure feudali hæredum generalium nomine mares tantum competit, adeo ut si Titius Mevio et ejus hæredibus feudum concefferit hæredes masculi tantum succederent, et non feminae.*

quoscunque, in the 13th or 14th Century, to make Room for the Admission of Females into either. But after such Admission, the Word *quoscunque*, which was once necessary, was dropt, as no longer so, and *hæredes sui* now mean *Heirs* of both Kinds, unless the Deed is relative to some former; in which Case the Meaning of those Words is still governed by the Investiture to which they relate.

Thanes existed in Scotland from the very earliest Periods of the History of that Country, after it yielded to the Eruptions of the *Germans*. The Office of *Earl* must be as ancient, though it is not so easy to trace it. Some Authorities fix its Origin in the Reign of *Malcolm III.* in the Year 1057; but *Buchanan* says (*m*) the giving them so late a Date was only the Opinion of some: And indeed it is probable, that this Prince only made Earldoms hereditary, which before were granted during Pleasure, or at most during Life, just as *William the Conqueror* was the first Prince who made Earldoms hereditary in *England*. Lady *Elizabeth Sutherland*, in her printed Case, *March 1769*, states, That the *Thanes* of *Sutherland* were mentioned in the History of Scotland as early as the Eleventh Century; and that the Title of *Earl* was known in Scotland in the Time of *Malcolm the Third*, who began his Reign in the Year 1057 (*n*). She produced an Indenture in the Year 1275, between *Archibald Bishop of Caithness* and *William Earl of Sutherland*, from which it appeared that the Earls of *Sutherland* existed before that Period (*o*).

There are two remarkable Periods in the History of the Peerage of *Sutherland*. One from its first Establishment until a new Creation in the Person of *Adam Gordon*, Husband to the Female Owner of the Estate of *Sutherland*, some Time about the Year 1515. The other, from the Creation of Earl *Adam* till the Death of the late Earl.

The Title-Deeds of the *Sutherland* Family that appear, are very imperfect, owing to this, that as the Descent of the Peerage was, during both Periods, like almost all other ancient Peerages, confined to Heirs Male, so it has been the Interest of the Family to conceal their Title-Deeds, which they knew would shew this. Yet, imperfect as the Production is, the whole Train of them, during the first Period, and the general Train of them, during the last, prove that the Family Estate was, like the Family Peerage, limited to Heirs Male only.

The first Family Charter, of any Consequence in this Dispute, which the Claimant, Sir *Robert Gordon*, has seen, is an original Grant of the 10th October 1347 (*p*), whereby King *David* the Second erects the Earldom of *Sutherland* into a free Regality, in favour of *William Earl of Sutherland* and *Margaret* his Wife, the King's Sister, *et hæredes inter ipsos*. It is none of the Title Deeds of the Estate: For, first, It could at most regulate only the Succession to the Privilege of the Regality, but not to the Lands of the Earldom, whereof the Right was not innovated: 2dly, That Grant of the Regality became extinct very soon: But this Charter proves, that Females were not, at that Time, within the Word *hæredes*; for the Grant of the Regality became extinct by the Death of *Margaret*, and *John*, her only Son, who died without Issue Male (*q*), which it would not have done, if the Heirs Female of the Marriage could have succeeded.

It

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etiamsi arma tractare didicerint, ut antiquitus Amazones solebant, ut de Joanna puella Aurelianensi et quadam hodie Hibernica narratur: ratio est quia ad ea quæ raro fiunt voluntates contrahentium non recte accommodantur.—Quod de filiabus diximus, idem de omnibus ex filia descenditibus five mares sint five fœminæ: nam ne mares quidem per fœmineam lineam descendentes ad successionem admittuntur. Ibid. N. 3. Hæc nisi aliter in investitura provisum fuerit, i. e. nisi tenor investituræ five solennis illa feudi concessio contineat nominatim, ut hæredes tam mares quam fœminæ, aut hæredes quicunque succederent, neque tamen ne hoc quidem casu fœminæ succedunt, nisi nullus superfit masculus. Quamdiu enim unus masculus filius extat fœminas excludit; et hoc propter armorum paratorem expeditionem. Provisum in investitura dicimus si ita concipiatur hæredibus suis quibuscunque: nam vocem hanc (hæredes quicunque) fœminas etiam comprehendere necesse est. Itaque talis clausula quoties in investitura expressa est, facit ut feudi successio, non minus ad fœminas quam ad mares (fœminas inquam quæ gradu sint propiores) pertineat—At nostri mores per generalem hæredum mentionem, etiam fœminas ad successionem non extantibus maribus, admitti putant. Hoc eo evenit ex adiectione vocis (quibuscunque) quæ determinatio etiam indubie fœminas comprehendit. Itaque est pronomen quod differentiam inducit quod in omnibus investituris adeo frequens est, ut etiam cum omisum est pro expresso habeatur.

Lord *Stair*, Lib. iii. Tit. 4. N. 20. "The Nature of proper Fees will hold forth the Nature of Succession therein; for a proper Fee being freely granted by the Superior to his Vassal for military Service, the Vassal's Person being chosen by the Superior, and a special Trust reposed in him, and the like Hope of his Issue, *patrem sequitur sua proles*: which was at first so simply done, that entering the Vassal in Possession, in Presence of his Peers, was a sufficient Constitution of his Right; and the Investiture signified then rather the Act constituting, than the Writ evidencing the Fee. In which Case, from the Nature of the Right, it is consequent, first, That none should succeed in the Fee, but such as were fit for military Service; and so Women and their Issue were utterly excluded, and all the Males succeeded equally."—Par. 21. "If the Fee be granted to Heirs whatsoever, not only doth the Issue of the first Vassal, but all other his lawful Heirs, or the lawful Heirs of the last deceasing Vassal, whether of the Issue of the first Vassal or not, do succeed: And now Fees being ordinarily acquired by Sale, Excambion or the like onerous Titles, *feuda ad instar patrimoniorum sunt redacta*; Heirs whatsoever are commonly expressed, and if they were not, they would be understood; for that which is ordinary is presumed."

(*m*) *Buchanan*, Lib. vii. Cap. 14. A nonnullis primus creditur nova et peregrina nomina quibus honorum gradus distinguuntur, a vicinis accepta nec minis barbara, quam erant priora, introduxisse.

(*n*) Lady *Elizabeth's Case*, p. 2.

(*o*) Appendix to Lady *Elizabeth's Case*, 1769, p. 1st.—Indenture, 1275. Inter Gilbertum, Willielmum et Walterum bonæ memoriæ episcopos Cathaniæ, et nobiles viros Willielmum claræ memoriæ, et Willielmum ejus filium, comites *Sutherlandiæ*.

(*p*) Printed in Lady *Elizabeth's Appendix*. "Sciatis nos concessisse et hac presenti carta nostra confirmasse dilecto genero nostro Willielmo Comiti *Sutherlandiæ* et *Margaretæ* sponse sue sorore nostre carissime quod ipsi et hæredes inter ipsos legitime procreandi habeant teneant et possideant de nobis et hæredibus nostris totum comitatum *Sutherlandiæ*, in adeo liberam regalitatem in perpetuum cum omnibus et singulis libertatibus commoditatibus asiamenis justis pertinentiis et liberis consuetudinibus que ad liberam regalitatem spectare noscuntur in omnibus et per omnia secuti aliqua regalitas per totum regnum nostrum liberius possidetur ab aliquo seu tenetur."

(*q*) In *Forduni Scoti Chronicon*, lib. xiv. cap. 25. initio, there is the following Passage: Eodem etiam anno (1361) premissa mortalitate nimium prevalente, (i. e. Angliæ) mortui sunt quidam de melioribus, et natu Scotiæ, nobilioribus, obfides

It may also be inferred, from the Limitation of the Regality, that the Limitation of the Estate was Heirs Male; for it is not likely that the Grant of the Regality would have excluded Heirs Female, the Grant of the Lands had admitted them.

Charter of
Lands, 1367.

The first Charter of Lands on Record is an original Grant by King *David* the Second, *Anno* 1367, of the Half of the Lands of the Thanedom of *Formartin* (a very large Estate); limited to *Heirs Male* expressly "Tenend. & habend. eidem Willielmo, & hæredibus suis masculis de corpore suo legitime procreatis, seu procreandis, de nobis, & hæredibus nostris (r)."

Charter 1455,
upon a Resignation.

In the Charter 1455, *John* Earl of *Sutherland* resigned the Earldom (*i. e.* the Land Estate) in favour of *John*, his Son and Heir apparent, who thereupon obtained a Charter under the Great Seal, proceeding upon the Resignation of his Father, and granting the Earldom of *Sutherland* to him, *tenendum illi & hæredibus suis (s)*. As this is only a renewed Grant, and relative to the former Investitures which were *Heirs Male*, the Word *hæredes* here, in sound Construction of Law, means *Heirs Male*. That the Investiture of the Land Estate, to which this Charter refers, stood to Heirs Male, is proved by Earl *John's* (who made the Resignation to which the Charter refers) having at that Time a Grand-daughter *Margery*, by his eldest Son *Alexander*, then dead, married to the Earl of *Caithness*. And in order to prevent any Claim, however weak of her's by means of her Husband's powerful Family to his Estate, he therefore made this Resignation in favour of his second Son *John*: But in the Instrument of Resignation, dated 22d February, 1455, he called him his apparent Heir (t); and the King, in the Charter upon this Resignation, reserved the Casualties of the Ward and Relief of the second Son, (who must then have been young) which shews that it was understood to be Heir in the Investiture.

Service of Earl
John, 1512.

John, the Son of this Earl *John* who resigned, is said by the Lady *Elizabeth* to have been retoured in the Year 1512, *legitimus & propinquior hæres Joannis comitis de Sutherland*. The Retour is not produced; the Seizure is in those Terms: But if he was so retoured, the Terms relate to the Conception of the former Investitures, and he took as *Heir Male*.

Of *Elizabeth*,
1514.

Elizabeth, the Sister of this last *John*, though a Female, did indeed take the Estate, by Service to her Brother, in the Year 1514. But how that happened, will be explained in another Part of this Case.

The Limitation
of the Peerage
during the first
Period was to
Heirs Male.

As the Investitures of the Estate, during the first Period, were to Heirs Male, so there is direct Proof that in the first Instance, where the Succession opened to an Heir Female, the Peerage went to the Heir Male, in Exclusion of the Heir Female; for this Earl *John* had two Sons, *Alexander* and *John*: *Alexander* died before his Father, leaving a Daughter *Margery*; and yet in 1460, the second Son, the Heir Male, succeeded to the Peerage, in Prejudice of *Margery*, the Heir Female.

Authorities to
prove that *Margery*
the Heir
Female, was ex-
cluded by her
uncle the Heir
Male, from the
Peerage.

Lord *Ochiltree*, in his Manuscript Collections, which are in the Advocates Library, an Authority often quoted by Lady *Elizabeth*, proves, That *Alexander*, the eldest Son of the first mentioned Earl *John*, had a Daughter, married to *William* Earl of *Orkney*; but that *John*, the second Son of this Earl, succeeded, to her Prejudice (u).

Margery left Issue, but that Issue never succeeded to the *Sutherland* Peerage. This is proved by a Charter 7th December 1476, from King *James* III. to *William Sinclair*, the Son of this *Margery*, and the Earl of *Caithness* (x).

Alexander Abredonensis, in his Book entitled "*Sutherlandia Comitum Annales*," wrote in the Year 1627, and now in Manuscript in the Advocates Library, mentions the same Thing (y); and adds, That her Father, the first mentioned Earl *John*, resigned the Earldom (that is, the Land Estate) for a new Investiture,

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obsides pro rege suo David, viz. Johannes de Sutherland, unicus filius comitis ejusdem, nepos regis, apud Linconiam circum festum nativitatis Nostræ Dominæ, et dominus Thomas comes de Moravia in civitate Londoniensi, &c.

(r) Royal Charter, Book I. No 157. Certified Copy produced.

(s) Printed in Lady *Elizabeth's* Case, 1769.

(t) The Evidence of this is to be found in the Lady *Elizabeth's* Case, which was printed in the Year 1769, p. 3. letter The Words are, "Instrument of Resignation, dated 22d February 1455, *John* Earl of *Sutherland*, in favour of *John* Sutherland land his Son and apparent Heir."

(u) Certified Extract, from the Advocates Library, "Under the Title, *Sutherland*;—*John* Sutherland, Earl of *Sutherland* succeeded his Father, *Robert*. He married *Margaret Baillie*, Daughter of the Laird of *Lamington*; and had Issue four Sons and two Daughters. *Alexander* died before his Father, and had Issue one Daughter, married to *William*, Earl of *Orkney*. *John*, his second Son, did succeed him; *Nicholas*, his third; *Thomas*, his fourth Son; *Elizabeth*, his eldest Daughter, married to the Laird of *Meldrum*; *Jean*, his second Daughter, married to *Thomas Dunbar* of *Carnock*, and had Issue one Son, *Gavin*, thereafter Bishop of *Aberdeen*. This Earl died at *Dunrobin*, and was interred at the Church of *Golfpykirkton*, which was built anno 1460."

(x) Certified Extract produced, "Jacobus, &c. dedisse, &c. dilecto consanguineo nostro Willielmino Sinclair filio dilecto comitis Cathaniæ & domini de Sancto Claro inter ipsum et consanguineam nostram *Majoriam comitissam Cathaniæ* sponsam suam genito." Book VII. N. 393.

(y) Certified Copy from the Advocates Library, produced, W. 5. I. p. 25. "Robertus successorem habuit Johannes filium hic uxorem accepit Margaretam (vel Magdalenam) Baillie domini Lamingtonii filiam, sceminam longe pulcherrimam, qua quatuor filios suscepit, Alexandrum, Johannem, Nicolaum et Thomam Beg; duasque filias; Joannem nempe et Elizabetham domino a Meldrum collocatam, Joanna nupsit Jacobo Dumbro a Cumnock equiti aurato ex quibus Gavinus Dunbar Aberdenensis præful (vir equidem sanctimonia et doctrina eximius) natus est. Alexander Sutherlandia (ut vocant) magister (Johannis comitis primogenitus) immatura morte præreptus, ante patrem factus concessit; unica relicta filia nomine Mariora; quæ per matrimonium copulata est Gulielmo Sinclaro Orcadam comiti ex quibus Sinclari jam Cattenesie comites propagati sunt."

the second mentioned Earl *John* (z); and that the Reason was, lest the Estate should be carried by *Margery* into another Family; and that he reserved his own Liferent of the Estate, and his Wife *Margaret*'s Dowry.

Sir *Robert Gordon* of *Gordonstown*, in his Manuscript History, a Book in many Things just, though not in all, gives the very same Account of *Margery*, and of the Resignation made by her Father (a). In speaking of the Reason of the Resignation, he indeed says (b), "Lest his Lands and Earldom should fall from his Heirs Male to the Daughter of his eldest Son *Alexander*, who was now dead;" from which it might be inferred, by a careless Reader, that the first mentioned Earl *John* was afraid his Peerage would go to the Heir Female: But there is Demonstration the Words Lands and Earldom are synonymous in this Passage; for Earl *John*'s Resignation, and the Charter upon it, which Sir *Robert* is here speaking of, have been quoted above; and they pass only the Lands, but not the Peerage. Besides, how could Sir *Robert Gordon* mean a Peerage, in a Passage in which he says, That the Resigner had reserved his own Liferent; and not only so, but his Wife's Dowry? How can the Liferent of the Fee of a Peerage, or the Dowry of a Peerage be said to be reserved?

Sir *James Balfour*, Lord Lyon King at Arms, who wrote in the Beginning of the Seventeenth Century, and whose Manuscript is also in the Advocates Library, relates in one Place, *Margery*'s Birth and Marriage (c); and in another Place, that she had Issue by the Earl of *Orkney* (d).

Father *Hay*, in his Memoirs written in the Year 1700, in Manuscript, in the Advocates Library, gives the same Account of the Existence of *Margery* and her Marriage (e). And

George Crawford, in his Peerage of Scotland, in one Passage of his Book, gives an Account of the Existence and Marriage of *Margery* (f); and in another Passage, of her Issue by the Earl of *Orkney* (g).

This Earl *John*, who succeeded in Exclusion of *Margery* the Heir Female, died some Years before 1514. A few Years after his Death, a material Alteration happened in the Line of the *Sutherland* Peerage, which deserves great Attention in the present Dispute.

This Earl *John* left behind him two Sons, *John* and *Alexander*, and a Daughter, *Elizabeth*, who was married to *Adam Gordon*, second Son to the Earl of *Huntly*. *John*, the eldest, was a weak Man; *Alexander*, the second, was a Minor. *Adam*, the Husband of *Elizabeth*, was a Man of great Ambition, and had high Pretensions; his Mother being Daughter to King *James* the First, and Widow of the great Earl of *Angus*, Head of the *Douglases*; his Father was Lord Chancellor; his Sister married to *Perkin Warbeck*, who,

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(z) Certified Copy from the Advocates Library. Produced, *W. 5. I. p. 26.* "Anno domini millesimo quadringentesimo quinquagesimo quinto, Johannes comes omni juri suo, quod in Sutherlandie comitatum habuit rege cessit, pro nova investitura filio suo Johanni; ne hereditas ejus per Marioram Alexandri filiam ad aliam gentem devolveretur: sibi ipsi tamen ad vitam annuo redditu, et dotalibus Margaretæ uxoris agris reservatis."

(a) Original produced, and which the Lady *Elizabeth* has quoted in her Case, "John Earl of *Sutherland*, who married *Margaret* (or *Magdalen*) *Baillie*, Daughter of the Laird of *Lamington*, a Woman of excellent Beauty, by whom he had four Sons and two Daughters, *Alexander*, *John*, *Nicolas*, and *Thomas* Beg. *Alexander*, Master of *Sutherland*, died before his Father, and had only one Daughter, called *Marjory*, who married *William Sinclair*, Earl of *Orkney*, of which Marriage are descended the *Sinclairs*, now Earls of *Caithness*."

(b) "The Year of God 1455, this *John*, Earl of *Sutherland*, took a new Investment of the Earldom of *Sutherland*, by Resignation of the same into the King's Hands, in favour of his Son *John*, reserving his own Liferent, and his Wife *Margaret*'s conjunct Fee-lands; which he did, lest his Lands and Earldom should fall from his Heirs Male, to the Daughter of his eldest Son *Alexander*, who was now dead."

(c) Certified Extracts from the Advocate's Library, produced. *A. 4. 25.* "John *Sutherland* succeeded his Father *Robert*, in the Earldom of *Sutherland*. He married *Margaret Baillie*, Daughter to the Laird of *Lamington*, in *Lanerkshire*, and by her had Issue four Sons and two Daughters. "*Alexander*, his eldest Son, died before his Father; and left Issue only one Daughter, *Mariana*, married to *William Sinclair*, Earl of *Orkney*.—*John*, his second Son, succeeded him."

(d) "Willielmus de Sancto Claro dux de Oldenburgh comes Orcadiæ dominus Zetland St. Clair, Diserte Cousland Roslyne, Herbertshire, Pentland, Niddale, Newburgh, Limitum Orientalium Scotiæ præfectus baro de Eckford & Caverton magnus Scotiæ camerarius et admirallus & aurei villeris eques. "He married to his first Wife, *Margaret Douglas*, eldest Daughter to *Archibald*, surnamed *Fineman*, Earl of *Douglas*; and by her had Issue a Son, *William*, who married *Isabella Lesley*, Daughter to *George* Earl of *Rothies*; and by her had Issue a Son, *Henry*, who was first Lord *Sinclair* of *Ravenshaugh*: he departed this Life before Earl *William*, his Father. "This Earl *William*, after the Death of his first Wife, married 2dly, *Marjory Sutherland*, Daughter to *Alexander*, called the Master of *Sutherland*, and by her had Issue two Sons and one Daughter.—Certified Extracts from the Advocates Library, produced, *A. 4. 25.*

(e) Certified Extract produced, from the Advocate's Library, *W. 2. 5.* "John, his Son, second of that Name, succeeded him; he married *Margaret*, or *Magdalen Baillie*, Daughter to the Laird of *Lamington*, a Woman of excellent Beauty, by whom he had four Sons and two Daughters, *Alexander*, *John*, *Nicolas*, and *Thomas* Beg. *Alexander*, Master of *Sutherland*, died before his Father, and had Daughter, called *Marjory*, married to *William Sinclair*, Earl of *Orkney*, Lord *Sinclair* and *Roslyne*, &c."

(f) *Crawford's* Peerage, p. 473. "John, his Son, who married *Margaret*, Daughter of Sir *William Baillie* of *Lamington*, by whom he had *Alexander*, Master of *Sutherland*, who died in the Lifetime of his Father, leaving no Issue, save a Daughter, *Marjorie*, married to *William*, Earl of *Orkney* and *Caithness*; *John*, the next Earl, *Nicolas* and *Thomas*; also two Daughters, *Jean*, married to Sir *James Dunbar* of *Cumnock*, and *Elizabeth*, to ———— *Meldrum*, of that ilk."

(g) Ditto, p. 382. "He (i. e. the Earl of *Orkney*) married first, *Margaret*, Daughter of *Archibald*, Earl of *Douglas*, by whom he had *William Sinclair* of *Ravenshaugh*, the lineal Ancestor of the present Lord *Sinclair*, his eldest Son, whom he disinherited; and a Daughter, *Catharine*, married to *Alexander*, Duke of *Albany*; next, *Marjory*, Daughter of *Alexander*, Master of *Sutherland*; by her he had *William*, in whose favours he had resigned the Earldom of *Caithness*."

though afterwards found an Impostor, was yet, by one Half of *Europe*, long believed to be Duke of York and Rightful Heir of the Crown of *England*; his eldest Brother was Lord Lieutenant of the North, one of the Governors to the young King, the most potent of the Highland Chieftans, and, without Doubt, one of the greatest Subjects in the Kingdom.

Practice of transferring Peerages from one Family to another.

It was usual, in former Days, for the Crown to transfer Peerages from one Family to another, upon the Resignation of the Peer or indeed upon his Consent, sufficiently manifested to the King (*b*): A Variety of Instances whereof appeared in the Competition for the Peerage of *Stair*, determined in the Year 1748*.

Adam Gordon's Arts to get the Estate to his Wife, and the Peerage of Sutherland to himself.

The State of the *Sutherland* Family, together with this Practice, suggested to *Adam Gordon* Views of Avarice and Ambition. To wait the Death of his Wife's two Brothers was tedious; and even though they died he could not get the Peerage to his Children through his Wife; having the Instance just before his Eyes of his Wife's Father's succeeding in Prejudice of his elder Brother's Daughter, as the Peerage of *Sutherland* went not to Females. He therefore formed a Resolution of effectuating his Views by the Act of his Wife's Brothers; and the Steps he took were as follow:

Adam's Arts to get the Estate to his Wife, and sit against Alexander.

In the Year 1509, he took out Breives for serving his Wife's Brother, Earl *John*, Heir to his Father, which Service was to proceed before the Earl of *Huntly*, *Adam's* own Brother, as Sheriff of the County. *Alexander* the Brother had at this Time prepared to oppose the Service; probably on Account, that *John* being a weak Man, *Alexander* thought he might represent him as an Ideot, and thereby object to his Capacity of being served. But as *Alexander* was at that Time but eighteen Years old, and could not act by himself, the Sheriff, the Earl of *Huntly*, appointed him Curators. These Curators, named by the *Huntly* Family, acted as might have been expected of them: For after Conferences with *Elizabeth Sutherland* and *Adam Gordon*, they agreed, or as the Instrument of Renunciation, hereafter to be mentioned, expresses it, "pro concordia colloquuntibus tandem in unum convenerunt & appunctuarunt," that *Alexander* should renounce, in favour of his Brother *John* and his Sister *Elizabeth*, and their Heirs, his Chance of Succession to the Estate of *Sutherland*, for an Annual-rent of Forty Marks, to be paid him by *Adam Gordon*; but that it should turn to himself if they had no Heirs. The renouncing Words are, "Quod ipse Alexander juri suo, in ad dictum comitatum, in favorem dicti Joannis Sutherland et Elizabeth Sutherland hæredumque suorum, pro certa compositione renunciaret." And to fix *Alexander* the faster, he is bound to swear, never to impugn this Transaction, and to renounce the Objection of Minority and Restitution in integrum. All these Things appear from an Instrument of Renunciation dated 24th July, 1509 (*i*). wherein *Adam Gordon* being present

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(*b*) There is a strong Instance of this in the Transmission of the Peerage of *Caithness*, to the Family of *Breadalbine*; per to the 1677. *John Campbell* of *Glenorchy* had paid great Debts for the Earl of *Caithness*; in Consideration of this, the Earl of *Caithness*, conveyed to him the Estate of *Caithness*, and consented that his Peerage should be transferred to him also. Upon simple Consent, without any Resignation whatsoever, the King gave a Patent to Lord *Glenorchy*, creating him Earl of *Caithness*, in respect of which he enjoyed the Peerage during many Years.—Evidence Patent, 28th June, 1677. Record of Charters, Book 1677, Fol. 29. Certified Extract produced. "Sciatis nos considerantes de mortuo Georgium comitem Cathaniæ, apud se statuisse, et designasse, deficientibus hæredibus masculis ex ejus corpore titulum honoris et dignitatis comitis Cathaniæ collocatum iri, post ejus obitum in dilectum nostrum Joannem Campbell de Glenurquhie ex eo quod ille suscepisset satisfecisset et solvisset, creditoribus dicti comitis non exigua debita, et diversas monetæ summas, eum eas debitas et acquisivisset eorum jura universi status Cathaniæ, quæ postea ratificata fuerunt per dictum comitem, similiter ei disposuit universum suum statum et in memoriam revocantes, antiquitatem et honorem familiæ de Glenurquhie quæ subnixæ est affinitate juncta fuit eminentissimis et nobilissimis familiis hujus regni nostri Scotiæ. Igitur fecimus nominavimus constituimus et creavimus."

There is another Instance which merits Notice, Lord *Maxwell* had been created Earl of *Morton*, upon the Forfeiture of *Douglas*, Earl of *Morton*. But upon the Restoration of *Douglas*, Earl of *Morton*, as it was thought improper that both *Maxwell* and *Douglas* should hold the same Peerage; therefore, to content the former, *James* the VIth, created him Earl of *Nithsdale*, with the Reservation of his Precedency. This Alteration could not have been made without his Consent, and he gives no formal Resignation.—Evidence Patent to *Robert*, Lord *Maxwell*, of the Peerage of *Nithsdale*, 29th August 1620. Record of Charters in Chancery, Book 49. N. 290. certified Extract produced.

* Vid. Printed Cases and relative Papers, in the Competition for that Peerage.

(*i*) In Dei nomine Amen. Per hoc præsens publicum instrumentum cunctis pateat evidenter quod anno incarnationis Dominicæ millesimo quingentesimo nono, mensis vero Julii, die vicesimo quarto, indictione duodecima pontificatus sanctissimi in Christo patris ac Domini nostri Domini Julii divina disponente Clementia papæ secundi anno sexto. Curia vicecomitatus de Innernys tenta in prætorio burgi ejusdem per providos viros Thomam Paterson et Jacobum Donald deputatos magnifici et potentis domini Alexandri comitis de Huntlye ac domini Badenach vicecomitis principalis vicecomitatus ejusdem providorumque notariorum et testium subscriptorum personaliter comparuit magister Gilbertus Hay a tornatus et eo nomine Joannis Sutherland filii et hæredis quondam Joannis comitis de Sutherland et Adam Gordon Abin cum Elizabeth Sutherland sponsa sua filia quondam memorati Comitis pro eorum interesse et breve quoddam inscriptionis cappellæ regiæ præfatis vicecomitibus deputatis eodem die deservient. presentarunt ipsosque vicecomites deputatos ejusdem brevis debitam executionem faciendam requisiverunt prout antea proclamatione previa ceterisque requisitis statuerunt petentes per idem asserentesque quod quidam dictus quondam Johannes comes de Sutherland obiit ultimo vestitus factus ut de feodo ad pacem et fidem domini nostri regis de comitatu de Sutherland cum castro de Dunrobin tenentibus tenendiis et liberorum tenentium servitiis ejusdem comitatus advocacionibus et donationibus cappellaniarum de Goll Helmsdail et Sancti Jacobi in ecclesia cathedrali Cathenen. et quod dictus Johannes Sutherland ejus filius erat legitimus et propinquior hæres ejusdem Joannis comitis patris sui de dicto comitatu cum castro tenentibus tenendiis et libere tenentium servitiis donationibus et advocacionibus cappellaniarum prædictis, et preterea secundum formam brevis ad omnes articulos ejusdem, et ex adverso comparuit Alexander Sutherland filius ETIAM dicti quondam comitis contra ipsum breve petitionemque dicti Joannis instanter cupiens quisque se in dicto comitatu jus hereditarium habere petiitque a præfatis vicecomitibus deputatis quia minoris fuerat octodecim scilicet annorum aut eo circa sibi ad lites curatores dari. Qui ejus petitionem reverendum in Christo patrem Andream Cathenensem episcopum miseratione divina commendatarium de Fern Willielmum Cathaniæ comitem Johannem magistrum Atholæ dominos Willielmum Spyne propositum de Thad et Thomam Roberti rectorem de Assint ipsi Alexandri curatores dederunt quibus curatoribus cum eodem Alexandro avisa et mutuo cum præscriptis magistro Gilberto a tornato Adam Gordon et Elizabeth Sutherland pro concordia colloquuntibus tandem in unum convenerunt et appunctuarunt quod ipse Alexander juri suo in et ad dictum comitatum in favorem de Joannis Sutherland et Elizabeth Sutherland hæredumque suorum pro certa compositione renunciaret salvo cum sibi Alexandro jure successionis si continget de successione hæredum dictorum Joannis et Elizabeth penitus deficere. Et statim idem Alexander Sutherland de consilio avasamento et consensu dictorum suorum curatorum in judicio coram dictis vicecomitibus

is the Person, and not his Wife, who delivers the Security to *Alexander* for the Forty Marks; "Pro quadam compositione et contentatione quadraginta mercatarum terrarum eidem Alexandro per dictum Adam Gordon per chartam et fasnam datarum;" and his Brother, the Earl of *Huntly*, is acting as Sheriff. The Reason why this Remuneration to *Alexander* was made by *Adam* is obvious; for though the Renunciation was in favour of *Adam's* Wife, yet he was to have all the Benefit of it; seeing, by the Law of *Scotland*, he must have the *jus mariti* during her Life, and the Courtesy of the Estate after her Death.

This Renunciation took Effect; for in the Account rendered 23d July, 1512, by *Andrew* Bishop of *Caithness* to King *James* the Fifth, in the Exchequer, for the Rents of the Earldom, as then due to the King by Non-Entry, there is this Article to the Credit of the Accomptant: "Et Alexandro Sutherland filio quond. Joannis comitis Sutherlandiæ in quadraginta marcis per literas domini regis sub subscriptione direct. auditoribus ad allocand. de anno compoti xxvi. lib. xiii. sol. iv. (k)"

Adam Gordon having thus got one Brother to renounce his Right in the Estate, proceeded next to the other. In order to frighten Earl *John*, he took out a Brieve of Idiocy against him in May 1514, and went so far as to set a Jury upon him*. But to stop the Effect of this, Earl *John* judicially agreed to declare, that *Elizabeth Sutherland*, and her Issue, failing, his own, should succeed to the Estate, and to give his full and ample Consent to such Right of Succession in an Instrument then prepared. The Words are, "Et statim antedict. vicecomes, ante egressum sive exitum dominorum dictæ inquisitionis extra curiam, prescriptum dominum comitem de Sutherland, qui sibi et sui hæreditati deficientibus hæredibus de corpore suo legitime procreandis succedere et jure hæreditatis terris et possessionibus suis hæreditarie gaudere tenentur, examinarunt, postularunt et viva voce accusarunt. Qui dominus comes palam et judicialiter declaravit quod Elizabeth Sutherland sua soror germana et sponsa Adæ Gordon et suæ proles idone procreati et procreandi deficientibus hæredibus de corpore suo legitime procreandis sibi et suæ hæreditati sunt proprie et immediate successur. et post suum decessum eisd. gaviur. et ad hæc suum plenarium consensum præbuit et assensum prout per tenorem hujus instrumenti animo non variandi præbet." Earl *John* was further prevailed upon to name *Adam Gordon* and another Person his Curators and Managers. The Words are, "Et quia dictus dominus comes naturalis intellectus debilis existit et est ob id summe expectabat ne sua hæreditas in toto vel in parte alienaretur seu dissipetur licentia supremi domini nostri regis obtinenda elegit et nominavit superscriptum Adam Gordon sponsum superscriptæ Elizabeth sororis suæ et Johannem Sutherland burghensem de Elgin rerum suarum potentes et providos ejus curatores et ad regiend. ac gubernand. se ac terras et possessiones suas quas cunque bonaque sua mobilia et immobilia presentia et futura (l)." After these Concessions, *Adam* proceeded no further on the Brieve of Idiocy.

Earl

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comitibus deputatis per verba de presenti omnibus melioribus modo via forma et jure quibus potuit et debuit omni jure et juris clameo petitorio seu possessorio liti et causæ quæ habuit habet seu in futurum habere poterit in seu ad dictam comitatum de Sutherland seu quamcunque partem ejusdem proprietatis seu tenendriæ in favorem dictorum Johannis Sutherland sui fratris et dictæ Elizabeth suæ sororis hæredumque suorum certioratisque per suos superscriptos curatores cum juramento de nunquam contradicendo specialiter et expresse necnon minorietatis et in integrum restitutionis beneficiis duntaxat perpetuo renunciavit salvo sibi Alexandro jure successionis si de hæredibus dictorum Johannis et Elizabeth si penitus defecerint pro quadam compositione et contentatione quadraginta mercatarum terrarum eidem Alexandro per dictum Adam Gordon per cartam et fasnam datarum quas cartam et fasnam ipse Adam eidem Alexandro manibus suis in judicio deliberavit Et sic ipsi vicecomites deputati ad dictam brevis deservationem antifato magistro Gilberto actornato dicti Johannis hujusmodi requirente rite processerunt super quibus omnibus et singulis dictæ partes et ipsarum quælibet a nobis notariis superscriptis sibi fieri petierunt unum vel plura publicum vel publica instrumenta appenditione sigillorum dictorum vicecomitum et Alexandri Sutherland renunciantis Acta erant hæc in prætorio prædicto de Innerneys hora quasi undena ante meridiem vel eo circa sub anno die mense indictione et pontificatu quibus supra præsentibus ibidem magnifico et præpotenti domino Alexandro comite de Huntly domino de Badzenach nobilibus viris Thoma Frazer domino de Lovat Alexandro Seton de Tullybody milite Willielmo Scot de Balivery milite Johanne Grant de Freuquhy Alexandro Ogilvy apparante hærede Jacobi Ogilvy de Desford milite David Douglas de Pittendreith et Hugone barone de Kilrac cum diversis aliis testibus ad præmissa vocatis et requisitis.

Et ego Joannes Dingwal presbyter Moravien. dioces. auctoritatibus apostolica imperiali et regia notarius publicus quia prædict. renunciatione ceterisque omnibus et singulis dum sic ut premittitur agerentur et fierent una cum infra scripto notario et testibus præsens sui eaque omnia et singula sic fieri vidi et audiui ac in notam cepi. Ideo hoc præsens publicum instrumentum manu mea propria fideliter scriptum exinde confeci et in hanc formam publicam redegi signo nomine et subscriptione meis solitis et consuetis una cum appensione sigillorum dictorum vicecomit. deputator et Alexandri renunciator. et subscriptione infra script. notarii signavi et subscripsi. In fidem et testimonium promissor rogatus et requisitus.

Johannis Dingwal pbr. Moravien.

Et ego Willielmus Nory presbyter Aberdonen. dioces. auctoritatibus apostolica et regali notarius publicus quia præfata renunciationi ceterisque omnibus et singulis dum sic præmittitur agerentur et fierent una cum notario et testibus superscript. præsens sui eaque omnia et singula sic fieri vidi et audiui ac in notam cepi ideo hoc præsens publicum instrumentum manu notarii superscripti fideliter scriptum exinde confeci et in hanc formam publicam redegi signo nomine et subscriptione signo nomine et subscriptione meis solitis et insuetis una cum appensione sigillorum dictor. vicecomit. deputator. et Alexandri renunciantis ac subscriptione superscripti notarii subscripsi et signavi in fidem et testimonium omnium et singulorum præmissorum rogatus et requisitus.

William Nory pbr. Aberdonen. The Deed, of which the above is a Copy, was produced to the Claimant by the Lady *Elizabeth's* Agent.

(k) Certified Extract from the Rolls of Exchequer is produced.

* Deed entitled, "Ane Commission to tak Cognition gif *John Sutherland* pretendit Erle yrof was ydiit or nott." Produced to the Claimant Sir *Robert*, by the Lady *Elizabeth*.

(l) In Dei nomine Amen. Per hoc præsens publicum instrumentum cunctis pateat evidenter quod anno incarnationis Dominicæ millesimo quingentesimo decimo quarto die vero mensis Junii decima tertia indictione secunda pontificatus sanctissimi in Christo patris et Domini nostri domini Leonis divina providentia papæ decimi anno secundo in meique notari publici et testien. subscriptorem presentia personaliter constitut. honorabiles viri Willielmus Scot de Balwery miles et Alexander Reid de Straloch vicecomites de Innernefs ad exequend. breve seu breviam ideotrie capelle supremi domini nostri regis impetratum seu impetranda super Johanne comite de Sutherland per literas commissionis serenissimi et excellentissimi domini nostri regis specialiter creati constituti et nominati superscriptum officium vicecomites de Innernefs in se et super se receperunt conjunctim acceptarunt necnon hujusmodi officio fungi in eodemque debite ministrare juxta contenta in dicta commissione in curia vicecomites de Perth ex mandato et auctoritate honorabilis viri Roberti Boonckle unius balivorum burgi de Perth per literas patentes supremi domini nostri regis suo signeto ex deliberationem dominorum concilii roboratas et fulminatas

Elizabeth serves to John, but not in the Character of Peerefs,

Earl John died in July 1514; his Sister was, upon the 3d of October following, served Heir to him in his Estate, without taking any notice of Alexander, and as if he had been dead also. But as she had no Claim to the Peerage, on account of being a Female, and of her Brother Alexander's being living, she was served by the Name simply of *Elizabeth Sutherland*, not of Countess of Sutherland. Her Service, consists of three Instruments; the Service, the Precept of Seafine upon that Service, and the Seafine upon that Precept (m). In the Service the Return of the Jury runs thus: "Qui jurati dicunt, quod quondam Joannes Sutherland comes Sutherlandiæ, frater germanus Elizabeth Sutherland, latricis presentium." This simple Denomination of *Elizabeth Sutherland*, without the Addition of Countess, is afterwards repeated. "Et quod dicta Elizabeth est legitima et propinquior hæres dicti quond. Joannis comitis Sutherlandiæ fratris sui." In the Precept it is said, "Compertum est, quod quondam Joannes comes Sutherlandiæ, frater germanus Elizabeth Sutherland latricis presentium, obiit, &c." Which Denomination of *Elizabeth* simply, as contrasted with that of the Peer her Brother, is repeated in the Deed. In the Instrument of Seafine, which is dated so low down as the last of June, 1515, her being a Gentlewoman, and not a Peerefs, is still more strongly marked; for she is only called a noble Damsel: "Nobilis dominicilla Elizabeth Sutherland sponsæ providi viri Adæ Gordon de Aboyn." In the Warrant of the Seafine she is called *Elizabeth Sutherland*, Air to umqll. John Erle of Suerland hyr Brother."——This Denomination is repeated in the Seafine. The Warrant orders to "put the said Elizabeth, or her Attorney, in the heretable Stayt and Possession of the said Erledome and Lordship of Suerland, baith Properte and Tenendry, be the delivering of Erd and Stain, as the Manner is." Which shews that her Claim was only to the Estate, not to the Peerage: For the Distinction betwixt *Property and Tenendry*, will not apply to a Peerage, and still less the delivering of Earth and Stone as the Symbols of it. It is impossible there could be any Mistake either in the Denomination given her, or the Claim she made: For she was served in the Midst of her Husband's Friends and Relations; his Brother, the Earl of Huntly, gives the Warrant for the Seafine, and his Nephew, Lord Gordon, is one of the Witnesses to it.

Adam Gordon is at that Time a Commoner.

It merits Attention, that at the Date of this Seafine, viz. the last Day of June, 1515, Adam Gordon was not Earl of Sutherland: For instead of being called "Nobilis et potens dominus comes de Sutherland," he is called "*Providus vir Ada Gordon de Aboyn*," an Expression of Character, which a Peer of that Age would not have looked upon as a great Compliment.

Adam gets the Peerage of Sutherland to himself.

The Opportunity fair, upon the Arrival of the Duke of Albany.

But Adam's Ambition was still unsatisfied unless he got the Peerage of Sutherland also. The Time which offered itself for this, was upon the Arrival of the Duke of Albany, to take the Regency of Scotland in Summer 1515 (n). That Duke had been educated in France, and was a Stranger to Scotland; he had many Points to carry; he was to defend his Title of Regent against the Queen, the Kingdom against Henry VIII. himself against his Enemies the powerful Lords of Hume and Angus (o), and the general mutinous Disposition of the Scottish Nobility (p); and to secure an Act of Parliament declaring him next Heir to the Crown, failing Issue of James V. It is certain from History, that, to protect himself from those of the Hume and Angus Faction, he sent for Troops from France.

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ad hæc facultatem habentes et in sua presentia jurarunt ac corporalia prestiterunt juramenta prout quilibet eorum a suprascriptum officium singillatim jurat et corporale juramentum præstat et exactis præmissis suprascripti vicecomites curiam vicecomitat. de Innerneß per Johannem Mathison pro tunc unum marorum ejusque affirmari et inchoari fecerint solemniter ordinarint in quia suprascripta commissione et breve de super direct. et apud crucem feralem burgi de Innerneß de prius per Jacobum Fidler etiam unum officiariorum et marorum suprascript. vicecomites de Innerneß in hac par palam proclamatum et proclamatum et debite indorsatum per lege et per publicam proclamationem ad fenistram pætor burgi de Perth omnibus et singulis interesse habentibus de super fieri causerunt mandarunt et judicialiter proclamarunt quod circa nullus contra suprascriptum breve pro tunc de servitutum dicto die objecturis comparentibus suprascripti vicecomites processerunt et condignam inquisitionem super contentio in dicto brevi cognoscendam et determinandam in presentia suprascript. Comitum de Sutherland elegerunt et jurare compulserunt solemnitatibus juris interim mediantibus et statim antedict. vicecomes ante egressum sive exitum dominorum dictæ inquisitionis extra curiam proscriptum dominum comitem de Sutherland qui sibi et sui hæreditati deficientibus hæredibus de corpore suo legitime procreandis succedere jure hæreditatis terris et possessionibus suis hæreditarie gaudere tenentur examinarunt postularunt et viva voce accusarunt dominum comes palam et judicialiter declaravit quod Elizabeth Sutherland sua soror germana et sponsa Ade Gordon suæ proles idonee procreate et procreande deficientibus hæredibus de corpore suo legitime procreandis sibi et sue hæreditati sunt proprie et immediate successur et post suum decessum eisd. gavisor et ad hæc suum plenarium consensum præbet et assensum pro ut per tenorem hujus instrumenti animo non variandi præbet et quia dictus dominus comes naturæ intellectus debilis existit et est ob id summæ expectabat ne sua hæreditas in toto vel in parte alienaretur seu dissiparetur licentia supremi domini nostri regis obtinenda elegit et nominavit superscriptum Adam Gordon sponsum suprascripti Elizabeth sororis suæ et Johannem Sutherland burgensem de Elgin rerum suarum potentes et providos ejus curatores et regiend. ac gubernand. se ac terras et possessiones suas quascunque bonaque sua mobilia et immobilia presentia et futura ita quod dicti curatores eum honorifici sustentent in victo et vestitu pro ut jura cavent super quibus omnibus et singulis me notario publico subscripto magister David Setton canonicus Aberdonii prolocutor dicti Ade Gordon sibi fieri exhiberi petiit unum seu plura publicum seu publica instrumentum seu instrumenta. Acta erant hæc in prætorio burgo Perth virtute dispensationis regis hora decima ante meridiem vel eo circa sub anno die mense indictione et pontificatus suprascriptis præsentibus ibid. nobilibus et prepotentibus dominis Willielmo comite de Errol Johanne comite de Ruthven venerabili patre Gauvino postulato de Arbroth nobiles dominos Willielmo domino Ruthven Johanne domino Gilberto Gray de Buttergask et Thoma Charters de Kinfawns cum multis aliis testibus ad præmissa omnia et singula rogatus et requisitus.

Memorand. There is a notorial Docquet to the Instrument, signed by Robert Thomas, Notary Publicus, Presbyter of the Diocese of Brechen, sacra apostolica et imperiali autoritatibus notarius publicus.

The two foregoing Deeds were produced to the Claimant Sir Robert, by Lady Elizabeth's Agents.

(m) All three are produced by Lady Elizabeth. The Service is dated 3d October, the Precept 14th October, 1515, the Seafine ult. June, 1515.

(n) That the Duke of Albany had arrived in Scotland, before the 20th June 1515; appears from a Charter, Book 51. of that Date, from the Duke of Albany to Lord Ruthven; a certified Extract of which is produced.—Buchanan, he arrived on the 13th of June that Year, L. 14. Chap. 1.

(o) Stewart's History of the Royal Family.

(p) Buchanan, Book 14th.

At this Distance of Time it is not incumbent upon the Claimant, Sir Robert Gordon, to specify the Means by which the Peerage was transferred from the old Sutherland Family to Adam Gordon, or the Mode of Creation by which that Transfer was made good. It is very probable that he had got either John, who was weak, or Alexander, who was dependent upon him (the one having given up to him the Management of his Estate, with the Succession to it, and the other his Birthright in the Estate) either to resign the Peerage in his favour, or to give such Consent to the Transfer as was, according to the Custom of the Times, a sufficient Warrant for obtaining a new Grant. It is also possible, that Alexander may have been attainted; either in the Rebellions which succeeded the Duke of Albany's Arrival, or on account of his Outrages to get Possession of the Sutherland Estate by Force, which he had renounced. This last is not improbable; for there is produced a Gift of Lands in a Charter (q), dated 5th September 1516, by Elizabeth Sutherland Countess of Sutherland, to the Earl of Caithness, "Pro bene meritis, gratuitis auxiliis, et conciliis, mihi, et sponso meo præfato, per dictum Johannem comitem Cathaniæ, grater, impensis, et expendendis in recuperatione dicti comitatus, et castris mei de Dunrobin, de manibus Alexandri Sutherland fratris mei, et ejus complicitum." And on the 11th March 1519, there is an Order of Council to the Earl of Caithness, "To pass with his Folks about the House of Dunrobin, (i. e. the Castle of the Sutherland Family) for the recovering of the same out of Sanders Sutherland's (i. e. Alexander's) Hands, and to close it with his Folks, while he get Help and Supply frae the Earl of Huntly; and that Letters be direct to him, giving him Power to raise our Sovereign's Lord's Leiges to pass with him for their seiging and covering of the said House (r)." From the Council Records it appears, that, during the same Period, he was at one Time in Custody of the Prior of Whitburn, a Man of Condition (s), the usual Custody of those Days (t); and at another a Prisoner in Edinburgh Castle (u).—It is certain that the Lord Home, with many others, was attainted by the Duke of Albany's Parliament in the Year 1516; and yet this Fact, as to Lord Hume, would be unknown, because the Record of Parliament is lost, if the Evidence of his Restoration against the Attainder had not been accidentally preserved in the Charters quoted below (x). There was no Country in Europe in which Attainders were so frequent, and for such slight Causes, as in Scotland, and for two Causes: First, the constant Party Wars between the King and Nobles, and betwixt the Nobles themselves; Second, that the Crown did not, as in other Countries, keep the Forfeitures, but bestowed them upon others, which made the great Families ready to thunder out their Dooms against each other, in order to reap the Spoils of the forfeited Persons. The Charter, in the Note below Letter (x) 22d June 1535, of Lord Hume's Estate, which was restored to him *per modum justitiæ*, recites, that his Forfeiture had been pronounced *pro parvis et exiguis criminibus*.

Whether Adam was created by Patent, or Investiture in Parliament, or by Creation in a Charter of Lands, or by what other Mode used upon such Occasions, is impossible to say; partly because many Charters are not recorded, partly because the Records of Parliament from the Year 1505 to the Year 1524 are lost (y), and partly because the Family of Sutherland have had an Interest to conceal the Patent or other Instrument of Creation, in order to gain Extension to the Limitations of the Peerage. It is however certain, that his Title has stood unimpeached above two Centuries and an Half. But it is fixed to a Demonstration, as far as Evidence can go towards Demonstration, that Adam was created by the Duke of Albany: Whereof there is both direct and presumptive Evidence.

The direct Evidence arises, 1st, From History. 2dly, From the Council Records. 3dly, From Royal Charters under the Great Seal. 4thly, From Records under the Privy Seal. 5thly, From Verdicts of Juries on Inquisitions. 6thly, From private legal Instruments. In all which he is universally, and without a single Exception, denominated Earl of Sutherland (z). In the Case of the Peerage of

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(q) This Charter is produced by Lady Elizabeth, and quoted Page 4th of her Case.

(r) Record of Council, 11th March 1519, quoted Page 12th, Note C.

(s) Record of Council, 25th September 1517, 20th February 1517, and 25th February 1517, quoted Pages 11th and 12th Note C.

(t) Buchanan gives the following Account of the Custody, into which the Earl of Home was put, at this very Time, by the Duke of Albany. "Sed antequam ad manus veniretur, Humius amicorum suafu, in proregis fidem se dedit: ac Edinburgum ductus, comiti Araniæ, Jacobo Hamiltonio suæ sororis marito datus est custodiendus; poena perduellionis denunciata, si eum dimitteret." Lib. 14. Cap. 5.

(u) Records of Council, 28th March 1517, quoted Page 11th, Letter C.

(x) Charter, Book 24, N. 171, 12th February 1531; Charter, Book 26, N. 173, 22d June 1535. Certificates of these Charters are produced.

(y) Certificate of the Keeper of the Records produced.

HISTORY.

(z) Lord Stair, Institute 2d, says, "Histories are probative in all Cases, where same is relevant, if they be authentic, and not contradicted by more authentic Histories of the same Time, as in the Case of Propinquity of Blood, or of Antiquity, and Priority of Dignity, Titles of Honour, &c."

Joannes Ferrerius was a Cotemporary of Adam Gordon, and well versed in the Scots History. He wrote the Continuation of Hector Boece's History of Scotland, the History of the Abbots of Kinloss, and that of the Gordon Family. He lived 30 Years at Court with Reid Bishop of Orkney, a Minister of State, at the very Time when Adam Gordon was acknowledged Earl of Sutherland, by Charters under the Great Seal. See Veterum Scriptorum Collectio, Tom. vi. p. 326. published by Martene, and printed at Paris, 1729. In the History of George Earl of Huntly, Father to Earl Adam, the Words of Ferrerius are these, "Adamum secund. genitum dominum de Aboyne instituit; cui postea per nuptias, Elizabetham Sutherlandiæ hæredem junxit matrimonio qua de re comes Sutherlandiæ deinceps creatur." Advocates Library, W. 5. p. 14. Harleian Collection, in the Museum, printed Catalogue 1759. N. 1423.

RECORDS of COUNCILL.

Sederunt Legatus Cancellarius Epif. Dunkelden. Moravien. Candidæ Casæ Dumblanen. Lefmören. comites de Huntly. Arane, regentes. Crawford Morton Marishall Errole Athole Cassillis Rothes Sutherland Montrose Prior Sancti Andreæ. "Abbates

of *Cassils*, one Extract from the Exchequer Rolls (a), wherein Lord *Kennedy* was marked Earl of *Cassils* on the 10th of *August* 1510; and one Charter of 5th *February* 1511, to the same Lord *Kennedy*, naming him Earl of *Cassils*, were held as Evidence that he was Earl of *Cassils*. But the Evidence of *Adam Gordon's* being Earl of *Sutherland*, is tenfold stronger. There is one, and only one, Piece of Evidence wanting; which is, that he does not appear from the Parliament Rolls, to have sat in Parliament: But this Defect is immaterial; the Rolls of Parliament being lost from 1505 to 1524.—The Attendance of the great Lords in Parliament was not very frequent in those Days; they esteeming it a Diminution of their Dignity and Consequence to mix with the lesser Barons, who all sat then and in the same Room with them. The few

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- Penult. Feb. 1517. "Abbates Sancti Crucis Calco Candidæ Cafæ Coldingham Post Dundrenad. Corfragwell Pluscardin domini Fleeming Maxwell Zetter Crichton Refs Semple Annandale Lyle Sancti Joannis clericus registri decani Glasguen. Dunkelden præpositus de Crichton officiis Ws. Scott de Belwery M. Ja. Wishart M. Adam Otterburn commissionarii burgorum Joannes Hamilton de Edin. Joannes Marr Aberdon. D. D. Lermont Sancti Andræ—Sederunt legatus Cancellarius comites de Huntly Urane Candidæ Cafæ Ws. Comes de *Sutherland*, Eglinton Glencairn Cassilis."—In the same Form with the former. Certificates produced.
- Penult. May 1523. Summons of recent spuilzie raised at the Instance "of *Elizabeth* Countess of *Huntly*, and *William Gordon* of *Auchen-den* her Servant, against *Alexander Friar* of *Strathowan*, *John Gordon* of *Quinzie*, and *Adam Earl* of *Sutherland*." On this Summons Procedure passes. Certificate produced.
- 4th December 1527. Order of Council which "discharges *Adam Earl* of *Sutherland*, *Margaret*, Lady *Gordon*, *Alexander Gordon*, &c. and others of their Band and Souerties for the Cause foresaid, and Letters to be direct thereupon." This Discharge bears to be granted with Consent "of *Archibald Earl* of *Angus*, Lord *Douglas* Chancellour of *Scotland*." So here is an Acknowledgment by the then Lord Chancellour of *Scotland*, the President of the Council, that *Adam* was Earl of *Sutherland*.
- 27th February 1531. Decree of Council in which *Adam Gordon* is stiled *Adam Earl* of *Sutherland*. Certificates of these two last Acts also produced.

RECORDS of Royal Charters under the Great Seal.

- 1st December 1527. In the Charter, Bk. 22. N. 32. 1st December anno 1527, by *James V.* to *Alexander Gordon*, Son of Earl *Adam*, he is entitled *Filio et hæredi apparent consanguinei nostri Adæ comitis de Sutherland*, et *Elizabeth Sutherland Comitissæ de Sutherland* sponsæ suæ; and this Title, comitis de *Sutherland*, is afterwards repeated in the same Charter.
- March 4, 1527. In the Charter, Bk. 22. N. 76. 4 March 1527, to *Alexander Sutherland*, he is stiled, *Filio et apparanti hæredi consanguinei nostri Adæ comitis de Sutherland*. Certified Copies of these two Charters are produced.

RECORDS of PRIVY SEAL.

- 1st April 1538. Gift 1st *Aprile* 1538, from the King of the Ward, of *John Earl* of *Sutherland*, to Sir *John Campbell* of *Calder*; in which the Gift is said to open, be Deceise of umqll. *Alexander Gordoun* Maister of *Sutherland*, *Adam Gordoun Earl* of *Sutherland* his Fader. Privy Seal Records, Bk. 11. f. 68. Certified Extract produced.

VERDICT of JURYS on INQUISITIONS.

- 1st October 1538. Service of Earl *John*, to *Adam Earl* of *Sutherland* his Grandfather, in which the Jury make the following Return: "Quod quond. *Adamus Gordon* comes de *Sutherland* proavus *Joannis Gordon* latoris præsentiam obiit ultimo vestitus et salitus."
- 7th December 1590. Breive, from the Chancery, to serve *Alexander Sutherland* great Grandson, Heir to *Adam*; in which Breive, *Adam* is called, "Quondam *Adamus Sutherlandiæ* comes proavus *Alexandri* nunc *Sutherlandiæ* comiti latoris præsentiam obiit ultimo vestitus et salitus."
- Same Date. Retour upon this Breive, the same Day in which *Alexander* is retoured as legitimus et propinquior hæres dicti quondam *Adami comitis Sutherlandiæ* proavus sui. These three Writs are produced by the Lady *Elizabeth*.

PRIVATE LEGAL INSTRUMENTS.

- 5th September 1516. Charter by *Elizabeth* Countess of *Sutherland*, to the Earl of *Caithness*, cum consensu et assensu nobilis domini *Adæ Gordon* sponsæ mei comitis de *Sutherland*. This Denomination of *Adam*, as Earl of *Sutherland*, is three Times repeated in the Deed. *Adam* signs before the Countess, at the Foot of the Deed, and his Signature is in the following Words: "Adam Earl of *Sutherland*, with my Hand at the Pen;" and is sealed with his Seal, which has this Writing round it, "Adæ comitis *Sutherland*." The Original produced by the Lady *Elizabeth*.
- 13th May 1518. Instrument of Seafine upon a Precept by the Earl and Countess of *Sutherland*, of the Lands of *Skelbo*, in favours *Andrew Kinnaird*; the Precept is said to be, Sigillis nobilium et potentum domini *Adam comitis Sutherlandiæ* nec non *Elizabeth Sutherland* et hæris et comitissæ ejusdem. In giving the Precept *Adam* names himself, "We *Adam Gordon*, Earl of *Sutherland*." The Original produced by the Claimant.
- 26th March 1525. Charter by Earl *Adam* and his Wife, of the Lands of *Duffus* and *Prousie*, in favours of *Sutherland* of *Prousie*. Omnibus hanc charta visures vel auditures *Adam Gordon* comis de *Sutherland* et *Elizabeth* sponsa mea comitissa et domina hæreditaria ejusdem communi nostrum consensu et assensu; in which *Adam* stiles himself *Adam Gordon comis de Sutherland*: This is repeated in the Deed, and it is sealed by his Seal, which bears this Inscription, *Adæ com. Sutherlandiæ*. The Original produced by the Lady *Elizabeth*.
- 8th April 1525. Instrument of Seafine, in favour of *William Sutherland* of *Duffus*, of the Lands of *Prousie*, by Earl *Adam* and Countess, in which the Earl is called, Nobilis et potentis domini *Adæ Gordon comitis Sutherlandiæ* et *Elizabeth Sutherland* comitissæ ejusdem. The Original produced by the Claimant.
- 13th July 1525. Precept of Seafine by Earl *Adam*, of the Lands of *Skelbo* (Part of the Family Estate) in favour of *John Kinnaird*, who runs thus: "Adam Gordon comes *Sutherlandiæ* ac dominus superior terrarum de *Skelbo* cum pertinen. cum consensu et assensu *Elizabeth Sutherland* sponsæ mei ac domina ejusdem terrarum." Here she is not called Countess, but only domina, that is to say, Proprietrix of Land. It is sealed by *Adam's* Seal, with the same Inscription round it as formerly. The Original produced by the Claimant.
- 11th August 1525. Instrument of Seafine to *John Kinnaird*, of the Lands of *Skelbo*. Nobilis et potentis domini domini *Adæ Gordon* comitis *Sutherlandiæ* cum consensu et assensu *Elizabeth Sutherland* sue sponsæ domine hæreditarie ejusdem. Here the Contract betwixt him as Earl, and her as Proprietrix, and is continued through the Deed. The Original produced by the Claimant.
- 2nd September 1535. Instrument of Seafine, of the Lands of *Prousie*, to *William Sutherland* of *Duffus*. Nobilis et potentis domini *Adæ Gordon* comitis *Sutherlandiæ* et *Elizabeth Sutherland* comitissæ ejusdem. The Original in the Possession of the Lady *Elizabeth*.
- 9th November 1527. Contract betwixt Earl *Adam* with the Countess on the one Part, and *Alexander* their Son on the other. "It is first appointed and agreed, betwixt a noble Lady, *Elizabeth* Countess and Heritur of *Sutherland*, and a noble Lord, *Adam Earl* of *Sutherland*, her Spouse on that one Part." It is thus signed, "Adam Earl of *Sutherland*, *Elizabeth* Countess of *Sutherland*, with my Hand at the Pen." The same Denomination of Earl of *Sutherland*, is given to *Adam*, in various Parts of this Deed. The Original produced by the Lady *Elizabeth*.
- 10th November 1527. Procuratory of Resignation of the Earldom, (that is, the Family Estate) with Consent of her Husband, in favour of *Alexander*, their eldest Son. Me *Elizabeth Sutherland* comitissan de *Sutherland* ac dominam hæreditariam ejusdem communi consensu et assensu nobilis domini *Adæ Gordon* comitis dicti comitatus. *Adam* signs it thus, "Adam Earl of *Sutherland*." Original produced by the Lady *Elizabeth*.

greater Barons that attended, were chiefly such as lived in the Neighbourhood of Parliament, or by their Offices were obliged to that Attendance (b). The same Right which intitled *Adam Gordon* to sit in Council as Earl of *Sutherland*, would equally intitle him to sit in Parliament as such. His Age, and the Distance of his Residence from the Seat of Government, sufficiently account for his not sitting in Council or Parliament after the Year 1525. But the Proofs of his enjoying this Peerage, are much stronger than all that can be brought of its Enjoyment by the preceding Earls of *Sutherland*, of whose sitting in Parliament no Mention is made in the Records. If, therefore, the Evidence as to them is sufficient, Earl *Adam's* must at least be equally so.

The presumptive Evidence that *Adam* was created, consists of the following Particulars :

1^{mo}, Upon the Death of Earl *John* in the Year 1514, supposing four Competitors, one of them only can be supposed to have got his Peerage, viz. his Sister *Elizabeth*, his Brother *Alexander*, an Heir Male of the Family, (if any such existed) or lastly *Adam Gordon*. *Elizabeth* did not take it either by Creation or Succession; not by Creation, for the now Claimant Lady *Elizabeth* does not alledge it; if she did, she would cut her own Ground, by yielding that *Elizabeth* took it not by Descent; and would assist Sir *Robert Gordon*, who would maintain that the Heir Male, under a Creation of which the Evidence is lost, will exclude an Heir Female, whether the original Grantee was a Female or a Male: As little could *Elizabeth Sutherland* take it by Descent, for it was descendible only to Heirs Male, and her Brother *Alexander* lived till the Year 1518 at least; and accordingly in her Retour, in her Precept, and in her Seafine, she is designed simply *Elizabeth Sutherland*, a Circumstance incredible, and indeed impossible, had she then had Right to the Peerage.—*Alexander Sutherland* did not succeed; for there is Evidence that he lived down to 1518, by a great Variety of different Documents, in which he is denominated simply *Alexander Sutherland*, by the Chancellor, by the Lords of Council, by private Parties, by the Officers of the Law, by his own Sureties, and five Times by himself or his Attornies, which is the same Thing (c), but is never designed Earl of *Sutherland*; nay, though

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(b) In the Cases of Precedency, betwixt the Earls of *Sutherland* and *Crawfurd*, in the Year 1706, printed at the joint Expence of the Lady *Elizabeth* and Sir *Robert Gordon*; there is a Certificate of the Rolls of Parliament, P. 50, from which it appears, that till very late in the Scotch Parliament, seldom more than six or eight Peers attended the Parliament.

(c) Renunciation by *Alexander*, of his Right of Succession, to his Brother *John*, and his Sister *Elizabeth*, and their Heirs, 24th July 1509, Page 6. Note, Letter I.

In the Account rendered, 23d July 1512, by Andrew Bishop of *Caithness*, to King *James* the 4th, in Exchequer for the Rents of the Earldom, as then due to the King, by Non-Entry, of which there is a certified Extract from the Rolls of Exchequer produced, there are the two following Articles to the Credite of the Accomptant.—“ Et Catrine comitisse pro sua secunda tertia dicti comitatus de tribus terminis hujus compoti, &c. et *Alexandro Sutherland filio quond. Joannis comitis Sutherlandie* in quadraginta marcis per literas domini regis sub subscriptione direct. auditoribus ad allocand. de anno compoti XXVI.” Lib. XIII. iiii. &c. &c.—“ Expensæ ejusd. in primis allocat. computanti pro tertia exeun. Catrine comitisse de *Sutherland* fibi debet de firmas dicti comitatus de terminis compoti et *Alexandro Sutherland filio quond. comitis Sutherlandie* in quadraginta marcis per literas domini regis sub sua subscriptione alias onus super compotum de anno compoti £. 26: 13: 4.

Record of Council, 12th October 1515, of which there is a certified Extract produced. “ Act, *James Dunbar* of *Cunzie*, against *Alexander Sutherland*, Son to umqll. *John Earl of Sutherland*, *William Cloyne* of that ilk, and *William Ryth of Strythbrora*, for Spuilzie.”

Charter, of which the Original is produced by Lady *Elizabeth*, dated 5th September 1516, by *Elizabeth Countess of Sutherland*, with Consent of *Adam*, Earl of *Sutherland*, her Husband, to *John Earl of Caithness*, of *Holmsdale*, with this Clause. “ Pro bene meritis gratuitis auxiliis & consiliis mihi et sponso meo præfato per dictum Joannem comitem Cathaniæ granter impensis et expendendis in recuperatione dicti comitatus et castri mei de *Dunrabin* de manibus *Alexandri Sutherland fratris mei et ejus complicum*.”

Record of Council, 12th October 1515, of which there is a certified Copy produced. “ Anent the Summons raised at the Instance of *James Dunbar* of *Cunzie*, against *Alexander Sutherland*, Son to umqll. *John Earl of Sutherland*, &c. *William Cheyne* of that ilk, and *William Keith* of *Strathbrora*, for Spuilzie.”

Ditto, 26th March 1517. “ Sir *William Scott* of *Baliverry*, Knight, in the Name of *Alexander Earl of Huntly*, askit Instrument and protestit that sen *Alexander Sutherland*, yar in Presence of the said Lords, has tain up and intro-mittit with the Relief of the Earldome of *Syerland*, with the quhilk he is chargid in the Chaker Rollis, and yat sen he is not of Power to pay the samyn: yat therefore, the Lords will compell him to relief him of the said Relief, and tak caution of him yat he shall not depart, quhil the said Caution be funden.”

Ditto, 28th March 1517. “ *Alexander Erle of Huntly* askit Instrument, and protestit that forsameikle as the Relief of the Erldom of *Sutherland*, quhilk lyes on his Heid as Sherrif, and yat he presentit *Alexander Sutherland*, quilk has intro-mitted therewith before the Lordis; and is in firmance in the Castle of *Edinburgh*: That therefore, the said *Alexander* sould relief him, and he to be discharged yrof in Time to come. Hora decima.”

Ditto, ult. March 1517. “ *Alexander Erle of Huntly* protestit, that sen *Alexander Sutherland* was entered in Ward within the Castell of *Edinbrough*, for the Relief and Nonentries of the Erldom of *Sutherland*; that therefore he could not be holden to the King's Grace therefore, nor to make Payment yrof, but to be dischargit of the samyn.—Mr. *Henry Spittal* forespeaker for the said *Alexander Sutherland*, askit Instruments and protestit, yat sin he is not of Power to pay the Soumes askit him to relief the said Erl, and has na Guds to pay the samyn, and could not be halden in Prifon for na Debt, and was ready to mak Faith he had na Guds, and when God provides for him, yat he have Guds to pay the samyn, yat he sal pay it.”

Ditto, penult. February 1517. “ The Lords of their Office has continuit, and continues the Summons of Error raised at the Instance of our Sovereign Lord, and *Alexander Sutherland* upon the Sherrif; and inquest yat servit *Elizabeth Sutherland* of the Earldome of *Sutherland*, on the 22 Day of May next to come, with Continuation of Days, but Prejudice of Party: Because the said *Alexander* was callit at the Tolbooth Door to have produced the said Summons and compeirit not.”

Ditto, 29th August 1517. “ In Presence of the said Lords compeirit *Alexander Sutherland*, the Son of umqll. *John Earl Sutherland*, and protestit that for sa meikle as he has raisit an Summons of Error at the King's Instance, and his upon the Sherrifs inquest that servit *Elizabeth Sutherland* of the Erldome of *Sutherland*, and desires the said Summons to be callit: That therefore, the Dilation of the Time of touching Summons of Error, and the Act of Parliament made thereupon, turn him to na Prejudice, sen he is ready to pursue the samyn. The quhilk Protestation the said Lords admit.”

Ditto, 4th September 1517. “ *Alexander Sutherland* askit Instruments, that *James Sinclair*, at the Command and Deliverance of the Lords, releisit him from the Procefs of the Horn, led upon him be the Erl of *Huntly*, and gave him the Wand of Peace for the Space of Ten Days next to cum. Hora 11.”

Ditto, 25th September 1517. “ *Alexander* postulat. of *Quibiltorne* askit Instrument, that for sa meikle as the Lords of Counseill desirit him to refave *Alexander Son to the Erl of Sutherland*, to remane with him for an certain Time, sen he is relaxit fra the Procefs of the Horn; the quhilk he refusit to do, notwithstanding the Lords foresaid requirit him to refave the said *Alexander*, to the Effect foresaid. The quhilk requiring, he said, he would obey. Hora 10.”

Ditto,

though at some Time in the End of *February* 1517, (in *England* then 1516), brought a Summons of Error of his Sister *Elizabeth's* Service to this Brother *John*, which he had (d) Right to do, his Renunciation being made in his Minority; and though some Proceeding was had upon it 29th *August* 1517; yet he never claimed the Peerage, nor attempted to recover it; being either conscious that his Brother had resigned it; (which he might do) or that he himself had, after his Majority, in which Case he could not impugn his own Deed; or that he was attainted, or by some other Mode of the Times had lost his Right to the Peerage.—No Heir Male appeared or claimed it as Mr. *Sutherland* of *Forse*, who pretends himself the Heir Male, owns.—*Adam Gordon* could not take it by Descent, having no inheritable Blood of *Sutherland* in him. In *Elizabeth's* Service as Heir to Earl *John*, dated in *October* 1514, and the Instrument of Seafine upon it, dated *June* 1515, he is stiled simply *Adam Gordon* of *Aboyne*; whereas, in an authentic Instrument, dated 5th *September* 1516, he is designed Earl of *Sutherland*; therefore in this intermediate Space he must have been created. There was no other Way by which he could acquire the Peerage: For as to Lady *Elizabeth's* Supposition, that he might be Earl by Courtesy, there is not the least Ground for it, as will hereafter appear.

ad Presumption.

2do, In the King in Council's Ratification (e), in 1617, of the Commissioners Decree of ranking the Nobility of *Scotland* in 1606, the Earl of *Sutherland* is described by the Titles of Earl of *Sutherland* and Lord *Gordon* of *Dornoch*, of which last, there is no Trace of Existence before *Adam Gordon's* Time. The Burgh and Estate of *Dornoch* was Part of the ancient *Sutherland* Estate*, and when *Adam* was created Earl of *Sutherland* this new Title was superadded; but to mark that from him sprung the new Root of the *Sutherland* Family, he retained in his new Titles his own Name, calling himself at once Earl of *Sutherland* and Lord *Gordon* of *Dornoch*: And this last Presumption is strengthened from the Name and Arms of *Gordon* having ever since *Adam Gordon's* Time, down to that of the Question of Precedency betwixt the Earls of *Sutherland* and *Crawfurd*, in 1706, hereafter mentioned, been borne by the Family of *Sutherland* (f).

The Services of Adam's Successors prove he was Earl.

Adam Earl of *Sutherland* had a Son named *Alexander*, who died before his Father, but left a Son named *John*, who succeeded him in the Earldom about the Year 1538. This Earl *John* is entered in the Parliament Rolls as sitting in, and is the first Earl of *Sutherland* who, from the Rolls now extant, appears to have sat, in Parliament (g). He was succeeded by his Son *Alexander*. *John* was served Heir to his Grandfather *Adam* on the 1st *October* 1538, and *Alexander* was also served Heir to *Adam* on the 12th *January* 1591. In the Retours of both of these Services, *Adam Gordon* is stiled Earl of *Sutherland* (h), which he could not have been, if *John* and *Alexander* had known he was not Earl of *Sutherland*, and still less, could the Officers of the Crown have given him that Designation; these Inquisitions proceeding upon Breives from the Crown Office of Chancery, wherein *Adam Gordon* was named Earl of *Sutherland*.

Disputes about Precedency among Nobility, prove Adam was Earl of *Sutherland*.

Frequent Disputes having arisen among the Nobility of *Scotland* concerning their Precedency, the King in Council, in the Year 1606, named Commissioners to determine them; who pronounced a Decree,

PROOFS and AUTHORITIES.

Ditto, eod. die. "Alexander *Sutherland* askit Instruments, that *David Purvis*, at the Command of the Lords, had releifit him simpliciter fra the Process of the Horn led againtst him, and in their Prefence gaife him the Wand of Peace, because they commandit the Prior of *Quibiltborne* to hald him with him, sa that he might not pass in the North Parts to mak trouble. Hora 11."

Ditto, 20th *February* 1517. "Alexander Prior of *Quibiltborne* askit Instrument, that he dischargit himself to my Lord Chancellour, and Lords of Counsal yar present, of the Sovertie of *Alexander Sutherland*, whilk was deliverit to him in keeping off twa before hora decima ante meridian."

Ditto, 25th *February* 1517. "Alexander postulat. of *Quibiltborne* protestit, that since he was desirrit be the Lords of Council, and at the Request of the Erl of *Huntly*, to hald *Alexander Sutherland* with him, yat he sould have na Charge of the Keeping of him, quhatever he did, sen he tuck not the Care of his Keeping upon him bot at the Request foresaid."

Ditto, 11 *March* 1519. "In Prefence of my Lords Regents and of Counsal, *Alexander* Earl of *Huntly*, Lieutenant of the North Parts, has consent, at the Counsal and Advice of the said Lords, to relax *John* Earl of *Caithness* fra the Horn, for the Space of Twenty Days, next to come, suae that he may in the mean time come before the said Lords to fullfill and obey their Command, in sick Things as they and he, be their and his Advice, shall think expedient for the common Weal of the Realm, with Certification to him, and he compear not to the Effect aforesaid, the said Twenty Days being past, and he not compearit before the said Lords; he to be denounced of new our Soveranes Lords Rebell, and put to his Horn, or else that he will in the mean time pass with his Folks about the House of *Dunrobine*, for the recovering the same out of *Sanders*, (i. e. *Alexander*) *Sutherland's* Hands, and to close it with his Folks while he get Help and Supply fra the Earl of *Huntly*, and that Letters be direct to him, giving him Power to raise our Soverane Lords Leidges to pass with him for the assieging and recovering of the said House; and in the mean time the Lords of Counsal suspends the Letters purchased by the said Earl of *Caithness*, for Sovertie and Lawburrows, to be taken of the Earls of *Huntly*, *Sutherland*, their Kyn, Friends and Servants; because the said Earl of *Huntly* has taken upon him, that the said Earl of *Caithness*, and his Servants and Company, fall safelie come to the said Lords, to the Effect aforesaid, without Harm or Skaith to be done to thame, under the Pain of 20,000 Merks."

N. B. The Sederunt of this Council, in which the Contrast is marked betwixt *Alexander* and Earl *Adam*, consisted of the following great Men: "Cancellarius Epi Dunkeld Aberdenen. Lismoren. comites de Angus Huntly Arrane Ergyle Mortoun Erole Montros Glencairn Caillis Prior Sancti Andr. Abb. Sancti Crucis Kelfo Dundrenane domini Erskine Drummond Forbes Hay Cathcart Sancti Joannis Archi. Sancti Andr. Duncanus Lestalrig Balivery clericus registri M. Ad Otterburn."

(d) Counting seven Years betwixt the 24th *July* 1509, the Date of *Alexander's* Renunciation, and the penult. *February* 1516; some Time before which Date, the Summons of Error had been raised; it is plain that it was within the quadriennium utile; for, from the 24th *July* 1509, *Alexander* had three Years of his Minority to run, and after that four after his Minority, within which he was entitled to bring his Reduction.

(e) Papers in the Precedency Action, printed at mutual Expence, Pages 72 and 94.

* Royal Charter, Book lii. N. 134. A certified Copy is produced.

(f) Certified Extract of Armorial Bearings, produced.

(g) Certified Extract, Roll of Parliament 1543, produced.

(h) Vide Retour of Earl *John*, 1538; Retour, 12 *January* 1591, of *Alexander Sutherland*; and Breive from the Chancery, upon which this Retour proceeds; both produced by Lady *Elizabeth*.

ratified

ratified by the King and Council in the Year 1617; but the Decree having reserved Liberty to the Parties interested to sue for an Alteration in due Course of Law, upon producing more ancient and authentic Writings, George, Earl of Sutherland, afterwards brought an Action for establishing his Precedency before the Earls of Argyle, Crawford, Errol, and Marischal, who had been ranked before him by the Decree; and the Action being moved in Parliament, was remitted to the Decision of the Court of Session, where it was made the principal Point of Dispute, whether the Earldom of Sutherland was held under the original Creation of that Honour, or by a more recent one, in the Time of Adam Gordon and Elizabeth his Wife. The Earl of Sutherland contended, that the ancient Honour had descended to Elizabeth, and was by her transmitted to her Posterity.—The Earls of Crawford, &c. insisted, That the Earldom of Sutherland was descendible only to Heirs Male, and could not therefore descend to Elizabeth; that in Fact Adam Gordon, her Husband, was Earl of Sutherland, so that there must have been at that Time a new Creation of the Honour in Adam's Person, from which only the Precedency of the Earls of Sutherland could be dated.—For colouring the Claim to the ancient Precedency, the Earl of Sutherland abandoned the Name and Arms of Gordon, which had been borne by all his Ancestors from Earl Adam to himself, and assumed those of Sutherland. He prosecuted this Claim with unwearied Pains and Diligence; and being possessed of all the Family Writings, would only produce such as tended to support his Claim. No Expence was spared in searching for Precedents of Female Succession to Honours; every Material was collected, and the Facts and Arguments stated, on the Earl of Sutherland's Part, with great Judgment and Ability.

But the Court of Session, after a most accurate Investigation, pronounced the following Judgment th January 1706. "The Lords find the Documents produced sufficient to instruct the Propinquity of Blood and Descent of the Dignity from William Earl of Sutherland, Brother-in-law to King David Bruce, to John Earl of Sutherland, served Heir to his Father Earl John Anno 1512; and find it not instructed by the Documents produced, that the Dignity of John Earl of Sutherland is conveyed to Elizabeth, his Sister, served Heir to him in the Estate in the Year 1514."—This Judgment is in Point, that though the then Earl of Sutherland was connected by Relation with the ancient Earls of Sutherland, yet he did not take the Peerage through them, or through Elizabeth, who, as a Female, was incapable of transmitting it; and consequently that he must have taken it through Adam Gordon: And as it was at this Time thought proper to lay aside the Name and Arms of Gordon, and resume those of Sutherland, for furthering the Claim to the old Peerage, in Opposition to the more recent one in Adam Gordon; the Idea of the Family itself must be, that the bearing the Name and Arms afforded a material Presumption in favour of a new original Creation in Adam Gordon.

As the ancient Investitures of the Estate, and Limitations of the Peerage, were, uniformly, until Adam Gordon's Creation, to Heirs Male; so the Investitures subsequent to that Period, as connected with the Peerage, prove the Persuasion of Earl Adam's Successors, that this new Peerage was descendible to Heirs Male only.

In 1527, Earl Adam and his Wife resigned the Sutherland Estate in favour of Alexander, their eldest Son; to whom a Charter passed 1st of December that Year, *et hæredibus suis*. As this Charter proceeds upon a Resignation, and is relative to former Investitures, the Words *hæredibus suis* plainly mean Heirs Male, who were the Heirs by former Investitures (i).

By a Precept and Seafine in 1559, it appears, that George Lord Gordon, the Earl of Huntly's Son, had granted a Charter constituting John Earl of Sutherland, and his Heirs Male, Sheriff's Depute of the County of Inverness, over the Bounds of the Earldom of Sutherland (k). Which Charter not only proves the general Limitation to Heirs Male, but also that the Regality which had been given to Earl William in the Year 1347, had not descended to Elizabeth, because she was a Female. For if that Regality, granted to Earl William, *et hæredibus inter ipsos*, had passed through a Female, this Sheriffship within the Bounds of the Earldom could not have taken place; a Sheriffship and Regality in the same Bounds being utterly incompatible.

In 1546, John Earl of Sutherland, then married to Lady Elizabeth Campbell Countess of Murray, resigned the Estate in favour of himself and his Spouse, and longest Liver of them, in conjunct Fee, "Et hæredibus inter ipsos legitime procreatis seu procreandis quibus deficient legitimis et propinquieribus hæredibus dicti comitis quibuscunque seu assignatis (l)." This is the first Alteration of the ancient Investitures of the Estate, and is probably made by Earl John to please his Wife, who was a Lady of very high Quality.

Charter 1580.

Charter 1583.
of Part of Estate
to Heirs Male.

Alexander Earl of Sutherland, the Son of this Earl John, resigned the Estate in the Year 1580, in favour of his eldest Son, "hæredibus suis et assignatis hæreditarie."—The Charter by King James VI. to this Earl Alexander, 5th July 1583 (m), of the Barony of Farre, is in the dispositive Clause, "Alexandro comiti de Sutherland suis hæredibus et assignatis." And the Reddendo is, "Reddendo inde annuatim memoratus dilectus consanguineus et conciliarius Alexander Sutherlandie comes hæredes sui masculi et assignati;" which shows, that Earl Alexander understood that *hæredes* and *hæredes masculi*, were, in the Investitures of this Estate, synonymous Terms. And though the Limitation was to Assigns after Heirs Male, that did not bring in Heirs Female as such, but only gave Power to the Earl to bring them in as Assigns.

Charter 1590,
of Sheriffship to
Heirs Male.

The Charter of Confirmation by James VI. in the Year 1590, of the Grant of the Sheriffship of Inverness, within the Bounds of the Earldom of Sutherland, made by Lord Gordon to John Earl of Sutherland in 1559, and confirmed by George Earl of Huntly in 1589, in the Dispositive and Reddendo Clauses, is in

PROOFS and AUTHORITIES:

(i) Certified Extract produced, Book 22. No. 32.

(k) "Feci constitui creavi et ordinavi nobilem et potentem dominum Joannem Sutherland comitem et suos hæredes masculos meos veros legitimos indubitatos irrevocabiles ac perpetuos vicecomites deputat. dict. vicecomitat. de Inverness infra singulas bondas comitatus Sutherlandie." Original produced by the Claimant.

(l) Printed in Lady Elizabeth's Appendix, 1769.

(m) Book 35. No 703. Certified Extract produced.

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these

these Words: " Alexandro Sutherlandiæ comiti hæredibus suis (n) et successoribus;" which is another Proof that *hæredes* and *hæredes masculi*, were, in the Investitures of this Estate, deemed to be synonymous Terms: For this Charter connects with the previous Grant of 1559, which is expressly to Heirs Male.

Charter of Novodamus 1601, restores Investitures of whole Estate to Heirs Male.

Earl John, who restored the Investitures to Heirs Male, had Female Issue living at the Time.

The above Alterations in the Investitures in 1546 and 1580, were in 1601 set right by Earl *John*, (Son of *Alexander*) who, in that Year, resigned the Estate into the King's Hands, and got a new Charter, which makes one of the capital Title Deeds of the Family. It proceeds upon a Royal Signature, erects the Estate into a Regality and separate County, to be called the County of *Sutherland*, changes the Holding from Ward to Blench, and comprehends the Lands of *Farre*, &c. which were resigned by the Earl, that they might be united to the Earldom (o). The Charter is, " Nostro consanguineo Joanni Sutherlandiæ comiti suisque hæredibus masculis inter ipsum et dominam Annam Elphinston Sutherlandiæ comitissam ejus sponsam legitime procreatis seu procreandis, quibus deficient. suis hæredibus masculis de corpore suo legitime procreandis, quibus deficient. Roberto Gordon suo fratri germano suisque hæredibus masculis de corpore suo legitime procreandis, quibus deficient. Alexandro Gordon etiam suo fratri germano suisque hæredibus masculis de corpore suo legitime procreandis."—At this Time Earl *John* had Female Issue living (p); and the Regality, which had been granted by *David II.* and had become extinct by the Failure of Heirs Male of that Marriage, is revived (q) in this Charter. The Grant, so far as regards the Regality, is an original one, and does not proceed upon a Resignation: Whence it may fairly be inferred, that as the Word *hæredes* in King *David's* Grant to Earl *William* comprehended not Heirs Female, so if there had been the same Limitation in the Land Estate which was erected into that Regality, it would not have comprehended Heirs Female.

Charter 1631, to Heirs Male.

In 1631, King *Charles* grants a Charter of Confirmation of the Regality, Sheriffship and Coroner of *Sutherland*, to *John* Earl of *Sutherland*, " hæredibus suis masculis et assignatis quibuscunque hæreditarie (r)." This does not bring in Heirs Female; only gives a Power to the Grantee to do it.

Charter 1662, to Heirs Male.

The Charter 21st February 1662, (upon the Resignation of Earl *John*) of the Estate of *Sutherland*, is limited to *George*, Lord *Strathnaver*, eldest Son of the Earl, " et hæredibus suis masculis cognomen de Gordoun utend. et insignia familiæ de *Sutherland* gerentibus et assignatis suis quibuscunque hæreditarie." (s) The same Observation applies to this Charter.

Charter 1681, to Heirs Male.

The Charter 24th July 1681, upon the Resignation of Earl *George*, of the Family Estate, is limited to *John* Lord *Strathnaver*, only Son of Earl *George*, and the Heirs Male of his Body; whom failing, to *George* Earl of *Sutherland*, and the Heirs Male of his Body; whom failing, to the eldest Heir Female of the Body of *John* Lord *Strathnaver* (t). After several other Limitations, the last Termination is, " Quibus etiam deficient. dict. comiti ejus propinquiorebus et legitimis hæredibus et assignatis quibuscunque hæreditarie." By this Charter, the Issue Female of the eldest Son, instead of taking immediately upon failure of his Issue Male, is postponed to all the Heirs Male of the Body of the Father; and the Exclusion of a Granddaughter from the Estate, in favour of her Uncle, could proceed only from a Consciousness that he must exclude her from the Peerage.

Schemes in the Contract of Marriage 1705, to alter the Limitations of the Peerage.

In 1705, *John* Earl of *Sutherland*, by his Son Lord *Strathnaver's* Marriage Contract settled the Family Estate upon *William* Lord *Strathnaver*, and the Heirs Male of his Body; whom failing, to the Heirs Male of his, Earl *John's* Body; whom failing, to the Heirs Female of Lord *Strathnaver's* Body, and the Heirs Male of theirs; whom failing, to the other Heirs Female of the said Earl of *Sutherland's* Body, and their Heirs Male, &c. (u). The dispositive Clause, has these Words, " Annalizes, dispones, and makes over, &c. all and sundry the Lordships, Barronies, Lands, Dignities, Jurisdictions, Privileges, and others after specified, with their Pertinents, viz. the Title, Honour, and Dignity of the Earl of *Sutherland*, and all and hail the Earldom of *Sutherland*, and all and sundry the Lands of the said Earldom, &c. together with all Right, Title Interest, Claim of Right, Property and Possession, which the said noble Earl, or his forefathers, have, can, or may pretend to the said Dignity, Earldom, Lordship, Barronies, reserving always, &c. to the said *John* Earl of *Sutherland*, during all the Days of his Lifetime, the said Title, Honour, and Dignity of Earl. The Clause assigning the Writs and Evidents, runs thus: " The said noble Earl *John*, Earl of *Sutherland*, hath made, constitute, and ordained, the said *William* Lord *Strathnaver*, his Son, his Heirs and Assignees, his undoubted and irrevocable Cessioners and Donators, &c. in and to the whole Writs and Evidents of the Earldom of *Sutherland*, Lordship of *Strathnaver*, Regalities, Barronies, Lands, and others respective above written, with their Pertinents, viz. all Patents of Honour, Acts of Parliament, &c. Hence it may fairly be presumed, that the Earl was then possessed of Patents and Acts of Parliament,

PROOFS and AUTHORITIES.

(n) Book 37. No 304. Certified Extract produced.

(o) Certified Extract from Records produced, Book 43. No 161.

(p) Gordonstoun Manuscript, p. 171.

(q) " Insuper nos perfecte intelligentes per inspectionem nostrorum antiquorum registorum Nec non per inspectionem veterum infeofamentorum per nostros nobilissimos progenitores concess. predecessibus dicti Joannis Sutherlandiæ comitis in presertim per quond. Davidem regem Scotiæ nobilissimæ memoriæ quod antedictus comitatus Sutherlandiæ per præfatum Davidem regem Scotiæ et alios suos excellentissimos progenitores concessus et dispositus fuit ad predecessores dicti nostri clarissimi consanguinei Joannis Sutherlandiæ comitis in unam liberam regalitatem pro perpetuo, &c. Ideo ac pro diversis aliis magnis respectibus et bonis considerationibus nos moven. nos ex certa scientia et proprio motu ereximus creavimus univimus annexavimus et incorporavimus tenereq. præsentis cartæ nostri pro nobis et successoribus nostris eregimus creamus univimus annexamus et incorporamus integrum prædict. comitatum Sutherlandiæ cum omnibus singulis, &c. in unam integram et liberam regalitate."

(r) Certified Copy produced, Book 53. No 154.

(s) Certified Copy produced, Book 58. No 93.

(t) Copy from Record produced.

(u) Certified Copy produced, Dal. Office, 7th February 1711.

relative to his Peerage, which are either suppressed or concealed, and might afford a Light in the present Dispute. Upon this Contract a Charter passed in 1706, to the same Heirs, which contains this Passage: "Omnes et singulas comitatum dominium baronias terras dignitates jurisdictiones privilegia aliaque postea mentionata cum pertinent. viz. totum et integrum titulum honorem et dignitatem comitis de Sutherland ac totum et integrum comitatum de Sutherland et omnes et singulas terras dict. comitatus cum castro de Dunrobinne, &c." (x) Though it was intended so far to preserve the ancient Line of Succession to the Peerage in the Male Line, as to prefer Earl John's second Son to Lord Strathnaver's Daughter, yet it was meant so far to violate it, as to bring in Lord Strathnaver's Daughter in Preference to the remoter Heirs Male: But Queen Anne having, from a Principle of Justice and sound Policy, refused to sign the Charter, an Act absolutely necessary for passing the Peerage, this Attempt of Earl John's to defeat the collateral Heirs Male, became ineffectual. But though the Lords Sutherland and Strathnaver could not impose upon the Crown, the Son of this last Lord attempted to impose upon the Public; for in his Contract of Marriage with Lady Elizabeth Wemyss in 1734, after settling the Family Estate upon Heirs whatsoever of the Marriage, he avers that the Estate and Earldom go together; and obliges himself to make a new Entail of the Estate of Sutherland, "so as the Honours and Estate may be united, and descend to one and the same Heirs; and shall bring in the Heirs whatsoever of this present Marriage, in the same Order of Succession, to the Estate and Earldom of Sutherland, as they have Right to succeed to the Title and Dignity of Earl and Countess of Sutherland; and that he and his forefathers shall provide and secure the said Estate and Earldom of Sutherland, in the best Manner accordingly (y)."

But nothing more strongly indicates the Consciousness of the Earls of Sutherland, that their Peerage went to Males only, than the last Earl's Operations upon his Family Settlements. He had only one Sister, married to Mr. Wemyss. 4th of September 1756, he executed a Disposition of his Estate, failing himself by Decease without Heirs of his own Body, to her and the Heirs of her Body; whom failing, "to the other Heirs succeeding to him in the Title and Dignity of Earl of Sutherland." This shews his Opinion with regard to the Descent of his Peerage: For he makes the Estate follow the Peerage only in the after Heirs, not in his Sister; fearing that the Peerage could never come to her, and that if he added such a Quality to her Title she would lose the Estate (z). The Earl, 12th of September 1759, made much such another Disposition, with some trifling Variations; but repeating the very same Distinction, and renewing the same Limitations (a). But in his Contract of Marriage, 14th April 1761, he involved his Sister with the remoter Heirs, settling his Estate on the "Heirs Male to be procreated of his Body, and the Heirs whatsoever of their Bodies; whom failing, to the Heirs Male to be procreate of his Body of any other Marriage, and the Heirs whatsoever of their Bodies; whom failing, to the Daughters of this Marriage, and the Heirs whatsoever of their Bodies; whom failing, to his other Heirs succeeding to him in the Dignity of Earl of Sutherland (b)." These three last Deeds demonstrate his Consciousness that his Peerage would not go to Heirs Female. In the two first, he does not make his Sister's Possession of the Estate depend on an Event which he had reason to fear would never happen, viz. her succeeding as Heir Female to the Peerage. In the last Deed, he overcomes this Difficulty. But when, in the same Deed, he has an Opportunity to make his Daughter's Possession depend upon the same Event, he is checked by a Consciousness, that if he made her Right to the Estate depend upon her Right to the Peerage, she would never enjoy either.

The last Earl died in 1766, leaving one Daughter, Lady Elizabeth, who takes the Estate without Controversy, and upon his Death three Claimants petitioned his Majesty for the Peerage of Sutherland, viz.

1st, Sir Robert Gordon, who claims as Heir Male of Adam Gordon, Earl of Sutherland, and of all the subsequent Earls of Sutherland. His Pedigree is stated and prefixed to this Case, with References to the proofs in its Support; and he grounds his Claim upon this Proposition, that when the Mode of Creation to a Peerage does not appear, by the Rule of Law such Peerage must go to Heirs Male of the Body of the Grantee, to the Exclusion of Heirs General; and that Adam Gordon was Earl of Sutherland by Creation.

2dly, Lady Elizabeth, claiming as Heir at Law, to Elizabeth, Wife of Earl Adam, as Countess of Sutherland, and to all the Earls of Sutherland before and since the Time of Elizabeth. Insisting that even the most ancient Peerages, of whose Creation there is no Record, go to Heirs Female: That Elizabeth, the Wife of Adam Gordon, was, as Heir Female of the ancient Peerage, Countess in her own Right; and that Adam Gordon was Earl of Sutherland only in her Right, by the Courtesy of Scotland.

3dly, George Sutherland of Forss, Esq; claiming as Heir Male of the ancient Earls of Sutherland, before the Time of Adam Gordon and Elizabeth. He joins Sir Robert Gordon against Lady Elizabeth, that ancient Peerages went not to Females, unless expressed in the Grant: But insists, against Sir Robert Gordon, that Adam Gordon took the Peerage of Sutherland without any Title at all: That it did not go to Lady Elizabeth, because she was a Female; nor to Adam Gordon, because he had no Right; and therefore remained with the Heirs Male of the ancient Earls of Sutherland, and consequently with him, as Heir Male of those Earls.

In March 1769, when the Day appointed for hearing was near, a Petition was presented by Mr. Wemyss on his own and his Wife, Lady Elizabeth, the last Earl of Sutherland's Sister's behalf, setting forth, That by a

PROOFS and AUTHORITIES.

(x) Records of Chancery, Book 23. Fol. 72.

(y) The Original in Lady Elizabeth's Possession. But a Note to the above Effect was given by the Lady Elizabeth's Doers to the Claimants.

(z) The Original in the Lady Elizabeth's Hands. The Claimant, Sir Robert Gordon's Doer, got a Note of it to the above Effect from her Doers.

(a) The Original in the Lady Elizabeth's Hands. The Claimant, Sir Robert Gordon's Doer, got a Note of it to the above Effect from her Doers.

(b) Summons of Reduction and Declarator, Lady Elizabeth Sutherland, and the Honourable James Wemyss of Wemyss, Esq; her Husband, against the Heirs and Substitutes called to the Succession of the Estate of Sutherland.

Marriage

Mr. Sutherland's
Plea.

Lady Elizabeth
Wemyss ap-
pears in 1769.

Marriage Settlement in 1706, and in another in 1734, the Petitioner's Wife, Lady Elizabeth, is called to the Succession of the Estate of Sutherland, next after the Issue of her Brother, William Earl of Sutherland, who died in 1766.—That her Brother Earl William, in his Marriage Contract in 1761, had settled the Estate, failing Issue of his own Body, upon the Heirs succeeding to him in the Dignity of Earl of Sutherland.—That by her Brother's Marriage Contract it might happen, in the Event of the Claimant Lady Elizabeth her Niece's dying without Issue, she might be excluded from succeeding to the Estate, by a Judgment in the Competition for the Peerage, to which she was no Party; and therefore praying, That they might be heard by Counsel, and the Question concerning the Title and Dignity, might be delayed for some reasonable Time, so as the Petitioners might be able to make proper Searches into the Records. This occasioned the Delay of Hearing.

As therefore the Claimant, Sir Robert Gordon, has now three Opponents, viz. Lady Elizabeth Sutherland, Mr. Sutherland of Forse, and Lady Elizabeth Wemyss, he will state the Reasons of his Preference separately, as to each of those Claimants.

As to Lady Elizabeth Sutherland.

Reason 1st.

REASON I. When the Limitation of the Peerage appears in the Instrument of Creation, that must regulate every Question of Succession thereto; but when by the Loss of the Instrument, the Limitation is unknown, the Question of Succession must be determined by legal Presumption. The Presumptions that the Limitation of the Sutherland Peerage was not to Heirs Female, as Lady Elizabeth Sutherland contends, are:

Presumption 1st.

1mo, She admits (Page 2d of her Case) that the Thanes of Sutherland were more ancient than the Time of Malcolm the Third; and that the Earls of Sutherland were as ancient as the Time of that Prince. As the former, they were Feudal Barons; as the latter, they were Feudal Officers; and both when the Feudal Law was the governing Law of Scotland (a). The Books of Fiefs were written 120 Years after the last of these Periods. By that Law (b), Women were excluded from the Succession to Fiefs of every Kind, whether of Land Estates or Offices. Lady Elizabeth has brought no Instance of a Female's holding a Land Estate in Scotland before the End of the 12th Century, and no Authority from a Law Book for Female Descent, even in Land Estates, until the *Regiam Magistatem*; which all good Antiquarians agree (c), was borrowed from Glanville and consequently could not have been written before the 14th Century; that is, three Centuries after the Origin of the Peerage in Question. But she cannot bring Rules of Descent from the 13th and 14th Centuries to prove the Limitations of a Peerage, which was created two or three Centuries before these Rules were thought of. Thus, by the double Relation of Feudal Vassal, and Feudal Officer, the Descent of the Peerage in Question must, from its original Nature, have gone to Heirs Male, in Exclusion of Heirs Female.

Presumption 2d.

2do, Another Presumption arises, from the Difference between Land and Peerages. When Lands fell into Commerce, which they did in Scotland as early as the *Regiam Magistatem* (d), Female Succession was introduced; Purchasers insisted that their Heirs, both Male and Female, should take; and Women were allowed to do the Service of a Fief, by a Substitute. But Peerages were never the Subjects of Commerce; nor could a Woman sit in Parliament by a Substitute. Again, Land is easily divisible among Coparceners, but a Peerage cannot be divided. It was therefore not unnatural that, as the Rigour of the Feudal Law abated Women should be let into the Descent of Land; but unnatural, from the Nature of Peerages, that they should succeed to such. The Law was also stricter in the Descent of Peerages than of Lands. Thus the collateral Heir Male of the original Grantee of Land, took the Land, though not of the Body of the Grantee; but the collateral Heir of the Patentee could not take the Peerage, because not of the Body of the Patentee (e). Land conveyed to one and his Assigns will go to the latter, but a Peerage thus granted will not even at this Day (f). Women indeed sometimes held Peerages; not by legal Descent, but by Exception therefrom. The Exceptions were two: One was where a Woman herself was created a Peeress; the other where Heirs Female were, in the Instrument of Creation, specially named in Preference to remoter Heirs Male or upon the Failure of all Heirs Male. But where such Exception appears not for want of the original Instrument of Creation to prove it, the original Presumption of their Exclusion by the general Rule, must take place.

Presumption 3d.

3tio, Even in Lands, as well as in Peerages, by a Limitation to *heredibus suis* or *heredibus inter ipsos* were for some Centuries understood in Scotland Heirs Male only (g). Now if even the express Words *heredes* or *heredes inter ipsos*, would not have let in Females at the Time this ancient Peerage was created, how can

PROOFS and AUTHORITIES.

(a) Vide Page 2. of this Case, where the Authorities are quoted.

(b) Vide Page 2. of this Case, where the Authorities are quoted.

(c) Spellman of Feuds. Craig, Lib. 1. Dieg. 8. N. 11.

(d) Reg. Mag. Lib. 3. Cap. 3.

(e) This was determined by the House of Lords in the Case of the Peerage of Oxensford, in the Year 1735. Vide Report of the Lords of Session 1739, to the House of Lords, and Resolution of the House there referred to.

(f) In the Case of the Competition for the Earldom of Stair in the Year 1748, the printed Case for Captain Dalrymple pointed out many Instances of Scots Peerages, in which the Holder had, in the Instrument of Creation, a Power to name a Successor from amongst a certain Series of Heirs. The Marshal Earl of Stair had, in the Instrument of Creation, taken the Title to himself, and the Heirs Male of his Body; whom failing, to such Person descended of his Grandfather, as the said Earl Marshal Stair should name and appoint in Writing, under his Hand, at any Time during his Life; And this Grant was ratified and confirmed by an Act of the Scottish Parliament, before the Union. He named his Nephew Captain Dalrymple, but the House of Lords dismissed his Claim.

(g) Page 2. of this Case, Notes Letter (l) where the Authorities are quoted.

the Instrument of Creation, the Terms of which are *not* known at all, because lost, or pretended so, be presumed to admit them?

4to, It is a Rule, *quod plerumque fit presumitur, quod raro fit, non presumitur*. Since the Creation of *Scots* Peerages, whose Limitations can be discovered, near Nine-Tenths have been limited to Heirs Male, or to Heirs of Line only upon the Failure of Heirs Male (*b*). Lady *Elizabeth* can claim no Favour from the Loss, or pretended Loss, of the Instrument of Creation, but must submit to the Presumption arising from the most customary Limitation of Peerages whereby she is excluded, at least during the Existence of any Heir Male.

5to, In a Doubt concerning the Descent of a Peerage, whose Limitations do not appear, the prevailing Course in similar Cases must afford a sound Ground of Presumption. It was the continual Custom of *Scotland*, without Exception, that in such Peerages, the remoter Heir Male succeeded in Prejudice of the Heir of Line. The Claimant has produced a long List of Instances of these Things, subjoined in the Note (*i*), with the proper Evidences to support them.

6to, Another

PROOFS and AUTHORITIES.

(*b*) It was impossible to get Evidence from Record of the Limitations of all the Peerages of *Scotland*: And therefore the Claimant Sir *Robert Gordon*, for the Truth of the above Assertion, appeals to the Limitations of the different Peerages in *Douglas's* Peerage; a Book indeed not perfectly accurate: But if there are Inaccuracies in the Description of the Limitations for Sir *Robert Gordon*, there may be Inaccuracies also against him. The Claimant Sir *Robert Gordon* can also appeal to the personal Knowledge of the Sixteen Peers of *Scotland*, that the Limitations of by far the greatest Number of the *Scots* Peerages stand to Heirs Male.

(i) L O R N E.

The Peerage of *Lorne*, the Limitations of which are unknown, was enjoyed in the Year 1452, by *John Lord Lorne*. This Lord *Lorne* died without Issue Male; and though he left Daughters, who got a Part of his Estate, yet his Brother *Walter* succeeded, as Heir Male to the Peerage of *Lorne*.—Evidence, 1mo, Royal Charter, "*Joanni domino Lorne*," dated 20th June 1452, Book iv. N. 176. 2do, Royal Charter confirming a Charter, "*Walter domini Lorne*," dated 7th May 1466, Book vi. N. 67. 3tio, Royal Charter, of the Lands of *Kuldrane*, to *Coline* Earl of *Argyle*, and his Wife *Isabell Stewart*, "*Filiæ quondam consanguinei nostri Joannis domini Lorne*." The Clause of Resignation runs thus: "*Quæquidem tertie partis terrarum prædictarum cum pertinen. fuerunt consanguineæ nostræ Mariotæ Stewart sororis dictæ Isabellæ ac filiæ et unius hæredum dicti quond. Johannis domini Lorne hæreditarie*." The above Charter is dated 10th May 1466, Book vi. N. 68.—Certified Extracts of the Charters here referred to are produced.

Lord HAY of YESTER.

Yester is an old Peerage, the Limitations of which are unknown. *William Lord Hay* of *Yester* died some Time before the Year 1591, leaving several Daughters, but no Issue Male; yet was succeeded in the Peerage of *Yester* by *James Hay* his Brother. *Jane Hay*, one of his Daughters, married *Alexander Horsburg*.—Evidence, 1mo, Royal Charter, "*Willielmo domino Hay de Zester*," dated penult. February 1590, Book xxxviii. N. 281. In this Charter *James* the Brother is mentioned, and the Daughters of Lord *William*. 2do, Royal Charter, confirming a Charter by the Provost of the Collegiate Church of *Bothans*, "*Jacobo domino Hay de Zester*," dated 6th September 1592, Book xxxvii. N. 494.—3tio, Retour, 17th May 1620, Book lxxi. Fol. 292; in which the Jury return, "*Quod quondam Willielmus dominus Hay de Zester proavus Alexandri Horsburche filii legitimi natu maximi Alexandri Horsburche de eodem inter ipsum et quondam Jeannam sponsam unam filiarum quondam Willielmi domini Hay de Zester legitime procreat*."—Certified Extracts of the Charters before referred to are produced.

B O Y D.

The Limitations of this Peerage are unknown. *Robert Lord Boyd* died in September 1540. He left several Daughters, and no Issue Male. His Peerage went to his Uncle *James*, Lord *Boyd*, to the Exclusion of his Sisters.—Evidence, 1mo, Retour, 10th April 1641, Book xvi. Fol. 182, of *James Lord Boyd* the Uncle, to his Nephew Lord *Robert*. The Jury return, "*Quod quondam Robertus dominus Boyd qui ultimo decessit fratris filius Jacobi nunc aomini Boyd latoris præsentium obiit ultimo vestitus et satus &c. et quod dictus Jacobus nunc dominus Boyd est propinquior et legitimus hæres masculus dict. quondam Roberti domini Boyd qui ultimo decessit ejus fratris filii*."—2do, Seafine, the last Day of November 1641, Book xvi. Fol. 146. "*Nominæ discretæ mulieris dominæ Mariotæ Boyd filiæ legitime quond. Roberti domini Boyd*."—Certified Extracts of the Deeds here referred to are produced.

R O S S.

This is an ancient Peerage, of which the Limitations are unknown. *William Lord Ross* died some Time before the Year 1649, leaving a Grand Uncle *William*, and Sisters. But his Grand Uncle took the Peerage, to the Exclusion of the Sisters of the Deceased.—Evidence, 1mo, Retour 20th March 1649, Book xix. Fol. 335. The Jury return, "*Quod dictus nobilis dominus Willielmus nunc dominus Ross de Halkheid et Melvill est legitimus et propinquior hæres masculus dict. quond. Willielmi domini Ross ejus fratris nepotis*." 2do, Retour 6th February 1649, Book xix. Fol. 316. The Jury return, "*Quod præfata magistra Maria Ross et una duarum sororum germanarum legitimarum et propinquiorum hæredum portionariorum linæ dict. quondam Willielmi domini Ross sui fratris germani et quod est legitime ætatis*."—Certified Extracts of the Charters here referred to are produced.

Lord FLEEMING.

James the Son of *Malcolm Lord Fleeming*, who lived in the Year 1557, left a younger Brother *John*, and a Daughter named *Jean*. But *John* succeeded in the Peerage to her Exclusion.—Evidence, 1mo, Royal Charter, penult. September 1541, Book xxviii. N. 75. "*Per consanguineum nostrum Malcolmum dominum Fleeming*."—2do, Royal Charter, 15th January 1557, Book xxxi. N. 578. "*Per dilectum consanguineum nostrum Jacobum dominum Fleeming dilecto suo fratri Joanni Fleeming*."—3tio, Royal Charter, penult. October 1583, Book xxxv. N. 849. "*Magistro Johanni Maitland de Thirlstane et magistræ Jeannæ Fleming suæ sponsæ*." The Clause of Resignation has the following Words: "*Quæquidem omnes et singulæ terræ baronia et annuus redditus respective prædict. cum partibus et pertinen. earundem præfatæ magistræ Jeannæ Fleming nepti et hæredi quondam Malcolm domini Fleming sui avi de eisdem perprius hæreditarie pertinuerunt*." 4to, Royal Charter, 18th January 1588, Book xxxviii. N. 292. "*Dilecto nostro consanguineo Joanni domino Fleming*."—Certified Extracts of the Deeds here referred to are produced.

G L E N C A I R N.

This is an ancient Peerage, the Limitations of which are unknown. *Alexander* Earl of *Glencairn*, who died in May 1670, left a Brother *John*, who succeeded him in the Peerage to the Exclusion of *Alexander's* Daughter, *Margaret* Countess

Prefumption
6th.

6to, Another Presumption arises from the Sentiments of Peers who were in a similar Situation. There are a Variety of Instances of Peers resigning Peerages, whose Limitations were unknown, and taking no Creation

PROOFS and AUTHORITIES.

tests of *Lauderdale*.—Evidence, 1mo, Special Retour of *John* Earl of *Glencairn* to his Brother Earl *Alexander*, dated 29th September 1670; Book xxx. Folio 103. The Jury returned, "Quod quondam *Alexander* comes de *Glencairn*, dominus *Kilmores*, frater germanus *Joannis* nunc comitis de *Glencairn*, domini *Kilmores*, obiit ultimo vestit et fasit, &c. et quod præfatus *Joannes*, nunc comes de *Glencairn*, est propinquior et legitimus hæres masculus dicti quondam *Alexandri* comitis de *Glencairn* ejus fratris germani, &c." 2do, Retour of Lady *Margaret* Cunningham, dated the 8th of August 1670, Book xxxii. Fol. 216. in which she is described to be the only Daughter, "Quondam *Alexandri* comitis de *Glencairn*."—Extracts of the Deed here referred to are produced.

Earl of ERROL.

The Limitation of this Peerage is unknown. *William* Earl of *Errol* died without Issue Male some Time before the 1560, and left only one Daughter, Lady *Jane* Hay, who became the Wife of *Andrew* Master of *Errol*. This *Andrew* was the Son of *George* Hay of *Logiealmond*, who, upon the Death of his Cousin-german *William* Earl of *Errol*, the Father of Lady *Jane*, succeeded as Heir Male to the Honours of the House of *Errol*, to the Exclusion of the said Lady *Jane*. Evidence, Royal Charter, 2d June 1562, Privy Seal Records, Book xxxi. Fol. 23. in which there is these Words: "Nichilominus volumus et concedimus ac pro nobis et successoribus nostris fideliter promittimus dilectæ consanguinæ nostræ *Joannæ* magistræ de *Errol* sponsæ consanguinei nostri *Andree* magistri de *Errole* nepti et hæredi linie dicti quondam *Willielmi* comitis de *Errole* sui avi."—Certified Extract produced.

Lord HOME.

This is an ancient Peerage, of which the Limitations are unknown. *Alexander* Lord *Hume* left a Brother *George*, and a Daughter *Janet*; which *Janet* was excluded from the Peerage by her Uncle the said *George*.—Evidence, Royal Charter, 12th February 1531, Book xxiv. N. 171. confirming a Grant made "per consanguineum nostrum *Georgium* dominum *Hume* Jonetæ *Hume* filiæ quondam *Alexandri* domini *Hume* fratris germani dicti *Georgii*."—Certified Extract produced.

Earl of DOUGLAS.

This is an ancient Peerage, of which the Limitations are unknown. *Archibald* Earl of *Douglas*, who lived about the Middle of the fifteenth Century, left a Daughter and Heir *Margaret*; and yet was succeeded in this Peerage by an Heir Male of the Family.—Evidence, Gift of the Marriage of *Margaret* de *Douglas* consanguinæ nostræ filiæ quond. *Archibaldi* comitis de *Douglas*, to *William* Earl of *Douglas* and *Avandale*. The Words are, "Carissimo consanguineo nostro *Willielmo* comiti de *Douglas* et *Avandale*." The Deed is dated the 11th Day of February 1449, Book iv. N. 145 and a certified Extract produced.

Earl of CRAWFURD.

This is an ancient Peerage, of which the Limitation is not known. *David* Duke of *Montrose* and Earl of *Crawford* left a Brother *John*, and a Sister *Margaret*. *John* succeeded to the Peerage of Earl of *Crawford*, and was succeeded therein not by his Sister *Margaret*, but by his Uncle *Alexander*, the Heir Male of the Family; and *Alexander* was succeeded in the Peerage by *David* his Son.—Evidence, Royal Charter, 1st April 1518, Book xxii. N. 45. which mentions, "Quandam cartam donationis factæ per consanguineum nostrum *David* comitem *Crawfordii* dominum *Lindsay* dilecto nostro *Alexandro* *Blair* filio et hæredi quond. *Margaretæ* *Lindsay* filiæ quond. *David* ducis de *Montrose* comitis *Crawfordiæ*." Earl *David* is described to be "filius et hæres quond. *Alexandri* comitis *Crawfordii* nec non hæres et successor quond. *Joannis* comitis *Crawfordiæ*." The Donation is said to be confirmed, "dilectis nostris *Joanni* *Blair* et *Alexandro* *Blair* ejus filio nec non filio et hæredi quond. *Margaretæ* sponsæ dicti *Joannis* et sororis præfati quond. *Joannis* comitis *Crawfordiæ* domini *Lindsay*." The Connection of Earl *David* with the forementioned Persons, is proved by the following Passage: "Nec non pro extinctione cujusdem pensæ litis motæ per dictam quondam *Margaretam* contra patrem nostrum antedict. patrum et hæredem dicti quondam *Johannis* comitis *Crawfordii* et post ejus decessum contra nos motæ penes omnes et singulas terras comitatus seu domininii *Crawfordiæ*."—Certified Copy of the above Charter produced.

Earl of CAITHNESS.

This is an ancient Peerage, the Limitations of which are not known. *Alexander* late Earl of *Caithness* died a few Years ago without Issue Male; his Daughter the Countess of *Fife* does not claim the Peerage, and there is now a Competition for it in dependance betwixt two remote Heirs Male of the Family.—Evidence, Special Retour of *Dorothea* Countess of *Fife*, dated 28th October 1767.—The Jury return, "Quod quondam magister *Franciscus* *Sinclair* de *Milntoun* patrum *Dorotheæ* comitissæ de *Fife* latricis præsentium unicæ legitime filiæ et prolis demortui *Alexandri* comitis de *Caithness* et uxoris *Jacobi* comitis de *Fife* obiit."—Record of Retours in Chancery, Book 1767, Certified Extract produced. 2do, Information given in to the Court of Session, 20th June 1769, by *William* *Sinclair* of *Ratter*, Esq; against *James* *Sinclair* of *Reis*.

Lord LINDSAY of BYRES.

An ancient Peerage, of which the Limitations are not known. This Peerage was enjoyed before the Year 1609, by *John* Lord *Lindsay*: He left a Brother *Robert*, and a Daughter *Ann*. *Robert* took the Peerage in Preference to her.—Evidence, 1mo, Retour, 8th December 1609, Book iv. Fol. 262.—The Jury return, "Quod quondam *Joannes* dominus *Lindsay* frater *Roberti* nunc domini *Lindsay* latoris præsentium obiit," &c. 2do, Retour, 17th April 1610, Book iv. Fol. 306.—The Jury returned, "Quod quondam *Joannes* dominus *Lindsay*, pater dominæ *Annæ* *Lindsay* latricis præsentium obiit," &c.—Certified Extracts of the above Retours produced. 3tio, *Crawford's* Peerage, Pages 86 and 184, from which it appears that *John* Lord *Lindsay* left a Brother *Robert*, and a Daughter *Ann*.

Lord SEMPILL.

This is an ancient Peerage, the Limitation of which is not known. *Robert* Lord *Sempill*, who died in the End of the last Century, left a Daughter *Ann*, to whom he had devised his Estate; but not having resigned his Peerage in her Favour, she could not take the Peerage. The King, upon a Narrative of its having been the Custom of *Scotland*, when the Heiress of a noble Family married agreeably to her Rank, to renew the Peerage to the Heirs of the Marriage, confers this Peerage of new on the Heirs Male of Lady *Ann* *Sempill*, by Mr. *Abercrombie* of *Fetterneir* her then Husband; whom failing, on her Heirs Male of any other Marriage. But as an Heir Male of the Family existed, it became necessary to procure his Consent to this Transmission of the Peerage, which he accordingly gives; and Mr. *Abercrombie*, upon a Narrative of his good Services to the Crown, is created Lord *Glasford* for Life. Evidence Patent, 25th July 1685, Record of Charters in Chancery. An authenticated Copy of the above Patent is produced, which proves the above Particulars.

Lord

Creations, limiting the Honour to Heirs Female on Failure of Males (*k*), which prove their Sense, that a definite and express Limitation was necessary for letting in Females who were otherwise excluded under an unknown and indefinite one.

7mo, In

PROOFS and AUTHORITIES.

Lord BORTHWICK.

This is an ancient Peerage of which the Limitation is not known. In the Year 1681, *John Lord Borthwick* enjoyed the Peerage; he left Heirs Female, who never pretended any Right to it. But the House of Lords, in the Year 1762, decreed it to a remote collateral Heir Male, without calling the Heirs Female to be heard for their Interest.—Evidence, *Retour*, 26th *January* 1681, Book xxxv. Fol. 265.—The Jury returned, “*Quod quondam Joannes dominus Borthwick avunculus Joannis Dundas de Harviestoun latoris presentium obiit ultimo vestit et fasit ut defeodo ad fidem et pacem dicti S. D. N. R. in totis et integris terris de Harviestoun, &c. Et quod dicti Joannes Dundas est legitimus et propinquior hæres dicti quondam Joannis domini Borthwick sui avunculi.*”—Certified Extract of the *Retour* produced.

Earldom of CASSILLS.

An ancient Peerage, of which the Limitations are not known. It was enjoyed by *John* the 8th Earl of *Cassills*, who died in the Year 1759, without Issue. Sir *Thomas Kennedy* his Heir Male, and the Earl of *March* his Heir of Line, both claimed his Peerage. The House of Lords decreed it to Sir *Thomas Kennedy*.

Lord LOVAT.

An ancient Peerage, of which the Limitations are unknown. This Peerage was enjoyed by *Hugh Lord Fraser of Lovat* in the End of the last Century. Upon his Death his Daughter *Æmilia Fraser* assumed the Title of Lady *Baroness Fraser*. But *Simon Fraser* the late Lord *Lovat*, the Heir Male, claimed the Peerage, in the Court of Session in Scotland. The Court, in July 1730, “*Decerned and declared, &c. the Title, Dignity and Honours of Lord Fraser of Lovat, to pertain and belong to the said Simon Lord Fraser of Lovat Pursuer, as eldest lawful Son of Thomas Lord Fraser of Lovat his Father, who was Grand Uncle to Hugh Lord Fraser of Lovat deceased, Father of the said Mrs. Æmilia Fraser, and Grandfather of the said Hugh M'Kenzie Defender, and consequently as Heir Male of the Family of Lord Fraser of Lovat, to whom the said Title and Dignity does descend.*”—Certified Extract from the Record of the Decrees of the Court of Session, for the Months of *June* and *July*, p. 5. is produced.

Earl of ATHOLE.

The Limitations of this Peerage are not known. Prior to the Year 1595, it was enjoyed by *John Earl of Athole*. He left no Heir Male, but several Daughters. *Mary*, one of his younger Daughters, was married to Lord *Innermeath*. *Dorothy*, his eldest Daughter, was married to *William Earl of Tullibardin*. By the Failure of Heirs Male, the Peerage became extinct. In order to revive it, King *James VI.* created Lord *Innermeath*, who had married the younger Daughter, Earl of *Athole*.—Evidence, Charter, 6th *March* 1595, Book lxi. N. 19. It narrates “*Quod totæ et integræ terræ et comitatus de Athole aliaque subscript. quæ per prius nostro quondam carissimo consanguineo Joanni Atholæ comiti proxime defuncto et suis prædecessoribus hæreditarie pertinerunt nunc in manibus nostris per decessum dicti quond. Joannis Atholæ comitis et suorum prædecessorum absque hærede vel hæredibus masculis nunc superstitibus legitime de eorum corpore procreatis devenierint, &c.*” And then goes on, “*Nos tamen memorie repetentes et intelligentes valde perutile et expediens nobis et successoribus nostris ac reipublicæ nostri regni fore ut dominus et familia dicti comitatus de Athole remaneat et continuetur et alius vir nobilis ejusd. cognominis et sanguinis eodem statu et loco dignus eidem provideatur unde nos et successores nostri nullo tempore affuturo ejusd. honorabili et maxime egregio servitio nobis et successoribus nostris per Atholæ pro tempore comites tam infra regnum nostrum quam in exteris nationibus prestitio et impenso destituamur. Ac etiam certam cognitionem habentes charissimum nostrum consanguineum Joannem nunc dominum de Innermeath virum nobilem antiquissimæ familiæ et cognominis de Stewart et dictum quondam Atholæ comitem et suos prædecessores proxime sanguine attingentem et maxime idoneum hujusmodi notabile et honorabile servitium nobis et successoribus nostris præstandum et supplementum.*” It then conveys the Land Estate of the Earldom, and lastly, the “*titulum nomen honorem gradum et statum comitis Atholæ.*”—Certified Extract of the Charter produced.

This Peerage became extinct a second Time in the Person of *James Earl of Athole*, the Son of the last mentioned Lord *Innermeath*. *Charles I.* therefore revived it in the Person of *John Earl of Tullibardin*, who had married *Dorothea*, the eldest Daughter of *John Earl of Athole*, in whom the ancient Male Line of *Stewart Earl of Athole* had failed.—Evidence, Royal Charter, 7th *February* 1629, Book 52. N. 89.—Certified Extracts of the Charter and Patent above-mentioned are produced.

Lord GRAY.

This is an ancient Peerage, whereof the Limitations are not known. *Patrick Lord Gray* died in the Year 1541, leaving an Heir Male, his Nephew, *Patrick Gray*, and many Daughters. This *Patrick* succeeded in the Peerage to their Prejudice.—Evidence, *Crawford's Peerage*, p. 181.

Second Instance in this Peerage.

Andrew Lord Gray, who lived in the Beginning of the last Century, left a Daughter, and sole Heir, married to *William Gray* younger, of *Pittendrum*. But she being a Female, could not take the Peerage; and therefore King *Charles I.* revived it by a Patent to this *William Gray*, and the Heirs Male of the Marriage betwixt him and *Ann Gray*, the Daughter of Lord *Andrew*.—Evidence, Patent, 8th *January* 1628, Book xxvi. N. 71. In which Charter, after an Account of the Services of the Family of *Gray* to their Country, there is these Words: “*Nunc autem cum nobis constiterit memoratum Andreæ nunc dominum ac baronem Gray destitutum filio masculino hærede ex corpore suo procreato qui ei succedat prediis et dignitatibus suis et unicam habere filiam jam nubilem spei optime et nobili ex utriusque parentis stemmate constiteritque memoratum nostrum consanguineum Andreæ ejus patrem consultis honoratissimis amicis suis omni cura incumbere et chari patris erga filiam unicam officio fungatur nec non hoc unice agere ut cognominis sui quispiam filia procreatus hæredes et succedat constiteritque hoc intuitu dictum Andreæ dominum Gray amicorum suorum consilio desponsasse unicam illam filiam suam dominam Annam Gray viro sui cognominis et ex sua familia nubere Gulielmo Gray juniore legitimo et primogenito filio Gulielmi Gray de Pittendrum Balivi de municipis.*” The Charter proceeds to narrate the Manner in which this Peerage was transferred from *Andrew Lord Gray*, to his Son-in-law, in the following Words:—“*Ita etiam præfatus Gulielmus Gray junior ejusque hæredes masculi post ejus obitum dignitate et honorum titulis fruuntur intereaque temporis indigetur ipse et designetur magister de Gray non aliter quam si filius Andreæ domini Gray legitimus esset quodquid tribuere quum penes ipsum non esset sed in manu nostra positum præfatus Andreas dominus Gray a nobis supplex petiit modo subscripto concedatur Quapropter nos ob predictas et multas alias rationes ex nostra autoritate regia ex certa scientia proprio nostro motu dedimus concessimus teneroque presentium damus et concedimus præfato Gulielmo Gray juniore ejusque hæredibus masculis (ut vocant) talæ durante vita dicti Andreæ domini Gray stilum titulum et dignitatem magistri de Gray ut ita designetur locatur ordinatur et honoratur durante vita dicti Andreæ domini Gray postque ejus obitum dedimus et concessimus dicto Gulielmo Gray juniore hæredibus ejus masculis talæ ut dictum est titulum stilum honorem et dignitatem domini et baronis in parliamentis dicti regni nostri nunc ad præfatum dominum Gray pertinen.*” Et

(*k*) A great Number of them were pointed out in the printed Case concerning the Earldom of *Stair*, given into the House of Peers 1748.

Presumption
7th.

7mo, In the Course of 700 Years, the Descent of the Peerage in question opened but once to a Female, viz. in the Case of *Marjory*, the Daughter of *Alexander Maister of Sutherland*, Son of *John Earl of Sutherland*,

PROOFS and AUTHORITIES.

"Et quæ ipse possidet ut perpetuo et omni tempore futuro designetur et indegitetur dominus Gray."—Extract Charter produced.

Lord HALIBURTON.

This is an ancient Peerage, of which the Limitations are not known. Some Time prior to the Year 1519, the Peerage was enjoyed by *Patrick Lord Haliburton*; he died without Issue Male, but leaving several Daughters, the eldest was married to *William Maister of Ruthven*, eldest Son of *Lord Ruthven*; but the Peerage extinguished by the Death of her Father.—Evidence, 1mo, Record of Parliament, 20th November 1469. In the Roll of which Parliament, *Haliburton* is marked, *inter dominos*. 2do, Royal Charter, dated 3d September 1529, confirming a Charter granted "per *Janetam Haliburton senio-rem filiam et unam hæredum quond. Patricii domini Dirleton et Haliburton cum consensu Willielmi magistri de Rothven sui sponsi*." Book xxiii. N. 92.—Certified Extracts of the above Charter, and Roll of Parliament are produced.

Lord HERRIES.

This is a Peerage, of which the Limitations are not known; and was enjoyed before the Year 1550, by *William Lord Herries*; he died without Heirs Male, but leaving three Daughters, the eldest of whom was married to *Sir John Maxwell*, second Son to *Robert Lord Maxwell*. Upon the Death of *Lord William*, the Peerage became extinct.—Evidence, Royal Charter, 1st February 1550, Book xxx. N. 497. "Dilectis nostris *Joanni magistro de Maxwell, et Agneti Herres seniori filiarum et uni trium hæredum quond. Willielmi domini Herres sponsi dicti Joannis*."

Upon the Extinction of this Peerage, the King revived it in the Person of this *Sir John Maxwell*.—Evidence, Records of Parliament, 16th April 1567. Certified Extracts of the above Charters and Roll of Parliament are produced.

STEWART, Earl of MURRAY.

An ancient Peerage, of which the Limitations are unknown. Prior to the 1st of January 1580, the Regent, *James Earl of Murray*, enjoyed this Peerage; he left two Daughters Heirs in his Estate, but by his Death the Peerage became extinct. "Evidence Gift by *James VI.* of the Ward and Marriage of *Elizabeth and Margaret Stewarts*, lawful Daughters and Heirs of the said *umquhill*, (i. e. deceased) *James Earl of Murray*. Privy Seal Records, B. xlvii. F. 63.—A certified Extract of the above is produced.

This Peerage was afterwards revived by Creation, in the Person of *James Stewart of Down*.—Evidence, Ratification in Parliament, 5th June 1592. It proceeds upon a Narrative of the Services performed to the King and Kingdom, by the late *James Lord Down*, "and his richt traift Cousing, *James Erll of Murray, Lord Abirneithie, &c.* Son and Air to the said *umquhill James Lord Down*; as also, for greit Luif, Favour and Affection quhilk his Majestie bearis to his richt traift Cousing *James now Erll of Murray*, Sone and apparande Heir to the said *umquhill Erll of Murray*, that last deceffit." And it ratifies "the Charter and Infeftment made be our Soverane Lords *umquhill Father and Mother*, to *umquhill James Erll of Murray, Lord Abernethy*, first Regent to our said Soverane Lord, and Guidfir (i. e. Grnd-father) to the said *James now Erll of Murray, umquhill Dame Annas Keith*, his Spouse, and to the said *umquhill Erlls Heirs therein designit*, of all and haill the Lands, Lordship, and Erledome of *Murray*, containing yairintill all and sundry the particular Lands, Milns, Multures, &c. as that samyn Charter, of the Date of the first Day of *Junij*, the Zier of God 1566 Zeris, likwys at mair length proportis." Records of Parliament, Book xviii. Fol. 74.—Certified Extract of the above is produced.

Second Instance in MURRAY.

The Limitations of this Peerage are unknown. *James Lord Down*, Son and apparent Heir of *Alexander Earl of Murray*, died some Time prior to the Year 1702, without Issue Male, but leaving Daughters. The Heir Male of the Family, *Lord Down's Brother*, succeeded to the Peerage, to the Exclusion of his Nieces.—Evidence, 1mo, Retour, 16th April 1702. The Jury return, "Quod quondam *Alexander Frazer de Streichen pater Jacobi Frazer nunc de Strichen procreat inter illum et dominam Emiliam Stewart ejus sponsam quæ fuit filia legitima natu secunda quondam Jacobi domini Down procreat inter illum et dominam Catharinam Talmasch ejus sponsam*." Record of Retours in Chancery, Book xlix. Fol. 379. 2do, Retour, 6th June 1710. The Jury return, "Quod quondam *Jacobus comes de Murray proavus Caroli nunc comitis de Murray latoris præsentium obiit ad fidem et pacem nuperi Caroli primi regis et quod dictus Carolus nunc comes de Murray est legitimus et propinquor hæres masculus dicti quondam Jacobi comitis de Murray*."—Record of Retours, Book liii. Fol. 452.—Certified Extracts of the above Retours are produced.

EARL of STRATHERN.

An ancient Peerage, of which the Limitations are unknown. *David Earl of Strathern* lived about the Middle of the 14th Century; he died without Issue Male, leaving a Daughter, *Euphame*, married to *Sir Patrick Graham*; the Land Estate of the Earldom stood limited *hæredibus suis*, that is to say, to Heirs Male, and failing them to return to the Crown. The Peerage must have become extinct upon *Earl David's* Death; but his Daughter being Niece to the Duke of Albany, Regent, possessed of the great Family Estate, and Representative of the Family, could not have Difficulty to procure a Renewal of the extinct Peerage to her Husband; and accordingly he and his Son *Malise* appear to have been Earls of Strathern. But when *James I.* returned from England, and understood that the Family Estate, which by the Limitation in the Investitures ought to have returned to the Crown, was in the Hands of *Malise*, whose Mother had no Right to it, he took the Estate from *Malise*; but afterwards, to make him Reparation, bestowed upon him the Earldom of *Monteith*, and created him Earl of *Monteith*, and gave the Estate and Peerage of *Strathern* to the Earl of *Athole*; the latter, probably with the Consent of *Earl Malise*.—Evidence, 1mo, Royal Charter, *Robert II.* Roll 4th, N. 4. 19th June, Anno Regni Primo; in which are these Words: "Sciatis quod concessimus *David senescallo militi comiti de Stratherne filio nostro carissimo comitatum de Stratherne cum pertinen. tenend. et habend. sibi et hæredibus suis in omnibus & per omnia juxta formam & tenorem cartæ sibi exinde confecta cum additione subscripta*." 2do, *Buchanan*, Lib. 10. Cap. 48. "Interea *Melissus Gramus* (quem diximus obsidem. Anglis datum) a rege dum in publicum patrimonium diligentius inquiri, lernia est spoliatus, quod eam comperisset avo ejus materno ea lege datam, ut deficiente stirpe mascula ad regem rediret; feudumque esset masculinum, ut interpretes juris nunc loquuntur." 3tio, Royal Charter, Book iii. N. 48; in which mention is made "Walteri Palatini de Strathern Atholiæ et Cathaniæ comitis." 4to, Records of Council, et 24th January 1502. The Decree bears, That Evidence was produced to prove, "That *Alexander Earl of Monteith* had granted, that *Malise Earl of Monteith* had nouthier Property nor Superiority till the Landis and Erledome of *Strathern*." 5to, Retour, Book x. Fol. 364. The Jury return, "Quod quondam *David comes de Stratherne abavus attavi nobilis comitis Willielmi nunc comitis de Monteith prædis concilii S. D. N. regis latoris præsentium obiit ad fidem et pacem S. D. N. regis pro tempore existen. et quod dictus Willielmus nunc comes de Monteith est legitimus et propinquior hæres ejusdem quondam Davidis comitis de Stratherne*."—Certified Extracts from the Records of the above Deeds are produced.

Sutherland, the Grandfather of *Elizabeth*, *Adam Gordon's* Wife; (for the pretended Instance of *Elizabeth*, was none, she having a Brother, *Alexander*, living at the Time of her Brother Earl *John's* Death) and in this single Instance Earl *John*, *Elizabeth's* Father, took the Peerage, in Exclusion of his Niece *Marjory*.

8vo, If the Investitures of the Family Estate can afford a Presumption, they stand against Lady *Elizabeth's* Claim; for during the first Period of the Peerage, viz. from its Origin until its new Root in *Adam Gordon*, they are all to Heirs Male. During the second Period, viz. that which succeeded the Creation of *Adam Gordon* down to 1706, the same Limitations in the Investitures continue; for in 1559, the Grant of the Sheriffship of *Inverness* is to Heirs Male expressly; and the Regality granted by King *David II.* sunk only because it could not, under a Limitation *hæredibus inter ipsos*, go to Heirs Female. In 1601, *John* Earl of *Sutherland*, probably with a View of obviating any possible Dispute from the Alteration made in the Limitations of his Estate by the Charters 1546 and 1580, resigned it into the King's Hands, and got a new Grant to Heirs Male, under the definite Term *hæredes masculi*. In this Investiture Heirs Female are not even called in the last Termination, though it is proved the Grantee had Daughters living at the Time. The Charters 1631 and 1662 are likewise to Heirs Male; and by that in 1081 Earl *George* settles his Estate upon the Heirs Male of his own Body, failing those of his eldest Son, to the Prejudice of his Son's Daughter: But the Contract 1705 and Charter 1706 shew more clearly than any of the foregoing, that the Earls of *Sutherland* knew their Peerage had been originally granted, and must descend to Heirs Male; seeing *John* Earl of *Sutherland* attempted, though without Success, to resign it, in order to let in Heirs Female. And it appears from the last Earl of *Sutherland's* Marriage Contract, in 1761, that he entertained the same Sentiments as the former Earls upon this Point. For failing Issue of his own Body he settles his Estate upon his Heirs succeeding him in the Title and Dignity of Earl of *Sutherland*, thereby expressing a strong Doubt of his female Heir at Law's being that Person.

9no, The Situation of *Elizabeth Sutherland's* Brothers, her own, *Adam Gordon's*, the Duke of *Albany's*, and that of the Nation, with the Advantages which *Adam* made of all these, favoured his Attempt to get the Peerage into his own Person.—The direct Evidence proves he succeeded; *in re tam antiqua*; it exhibits an irresistible Concatenation of Proof. For how is it possible to believe that History would represent him as Earl of *Sutherland*? That the Council, every Member of which, who was a Nobleman, had an Interest in opposing his Seat, as such would allow him to sit? That the Officers of the Exchequer, Chancery, and Privy Seal, would declare him such? That Juries, upon Oath, would return him? That the Council, as a Court of

PROOFS and AUTHORITIES.

EARL of ANGUS.

This is an ancient Peerage, the Limitation of which is unknown. It failed with *Thomas Erle of Angus*, some Time prior to the 1379. He left two Daughters Heirs in his Estate. *Margaret* the eldest, was first married to *Thomas* Earl of *Mar*, and afterwards to *William* Earl of *Douglas*. In a Royal Charter of *Robert II.* dated in 1379, published in the late Competition between the Duke of *Hamilton* and Mr. *Douglas* of *Douglas*, for the ancient Estate of *Angus*, before the Court of Session in Scotland; *Margaret* is mentioned as Countess of *Mar* (not of *Angus*); soon afterwards this Peerage has been renewed in the Person of Earl *William*, the Husband of the said *Margaret*; for there is a Royal Charter, published in *Anderson's* Deplomata, dated in the Year 1390, in which *Margaret* has the Title of Countess of *Angus* and *Mar*; the first of which Designations she took as the Wife of the Earl of *Douglas*, who, it is highly probable, would be created Earl of *Angus*, to himself and the Heirs Male of the Marriage, when he married the Heiress of the Estate. In 1398, *William* Earl of *Douglas* being then dead, *George Douglas* his Son, by Countess *Margaret*, in a Royal Charter of King *Robert III.* also published in the Competition betwixt the Duke of *Hamilton* and Mr. *Douglas*, appears to have succeeded to his Father in the Peerage of *Angus*, being therein designed Earl of *Angus*. Yet at this Time his Mother, Countess *Margaret*, was alive, as appears by an Indenture dated in 1410, mentioned in the Papers printed in the Suit for the Peerage of *Loval*, as in the Possession of the Marquis of *Tweeddale*.—Evidence, 1mo, Charter, by *Robert II.* 9th April 1379, "Dilectæ consanguineæ nostræ Margaritæ senescal comitissæ de Marr, filiæ seniori et unicæ hæredi quondam Thomæ senescal comitis Angusiæ." Appendix for Mr. *Douglas*, N. 2. P. 32. 2do, *Anderson's* Deplomata, N. 57. Royal Charter, *Robert II.* 10th April 1390, confirming a Grant made by "Margareta comitissa de Angus et de Marr Alexandro de Hamilton militi." 3tio, Royal Charter, by *Robert III.* dated in 1398, confirming a Grant, "Dilecto et fideli filio nostro Georgio de Douglas comiti de Angus."—Appendix for Mr. *Douglas*, N. 2. P. 35. 4to, *Loval* Papers, additional Condescendence for *Symon* Lord *Loval*, January 1730. There is also a Deed in the Cartulary of *Coldingham*, dated 4th January 1415, by which *Margaret* Countess of *Angus* appears to be then alive, and in which she is designed *Margareta comitissa de Angus et de Marr*. But the Claimant *Sir Robert* has only a Copy of this Deed, not having access to the Original.

Second Instance in ANGUS.

Archibald Earl of *Angus*, died without Issue Male, leaving a Daughter, Lady *Margaret Douglas*; yet he was succeeded in his Peerage, not by his Daughter, but an Heir Male of the Family of *Angus*.—Evidence, 1mo, *Sandford's* Genealogical History of the Kings of *England*, Book vi. Chap. 5. P. 523 and 525. where *Margaret Douglas* is designed Daughter and sole Heir of *Archibald* Earl of *Angus*, by *Margaret* Queen of *Scots*, his Wife, and she herself is called Wife to *Matthew* Earl of *Lennox*, Niece to King *Henry VIII.* and Grandmother to King *James I.* of *England*, and is said to have been born Anno 1516. 2do, Contract betwixt the Earl and Countess of *Lennox*, and Lord *Darnly* their Son, with Consent of Queen *Mary* on the one Part, and the Earls of *Angus* and *Morton* on the other Part, Anno 1565. The Contract describes the Parties in these Words: "Traist Friends after oure heartlie Commendatione, forasmuchas there is an Contract and Appointment past and subscryvit be Us, *Margaret* Countess of *Lennox*, the only lawfull Dochter and Heyre of umquhil *Archibald* Erle of *Angus*, &c. gottin betwixt him and umquhil *Margaret* Quene of *Scottis*, our maist deir Mother of guid Memorie, *Matho* Erle of *Lennox*, her Spouse, and umquhil *Harie*, be the Grace of God, King of *Scottis*, our Son on the one Part, and *Archibald* now Erle of *Angus* oure Cousing, Air of Tallie of our said umquhil Fader, with Advyse of *James* Erle of *Mortoun*, Lord of *Dalkeith*, his Tutor, on that uther Part." Appendix 1st for Mr. *Douglas*, P. 1st. 3tio, Ratification in Parliament, dated 19th April 1567, to *Archibald* Earl of *Angus*, in which he is called by Queen *Mary*, "Consanguineus noster *Archibaldus* nunc comes Angusiæ dominus Douglas," and is said to be "Legittimus et propinquior hæres masculus et talliæ præfati quond. Jacobi magistri Angusiæ filii fratris avi sui." Parliament Records, Book xiii. Fol. 34.—Certified Extract of the above Ratification is produced, and Copies of the printed Papers above-mentioned.

INSTANCE THIRD.

Archibald Earl of *Angus*, who died in 1588, is said to have left two Sisters; yet there is Evidence that the Peerage went to a remote Heir Male, *Sir William Douglas* of *Glenberry*.—Evidence, Books of Session, 11th February 1590. in which is registered an Acquittance by King *James VI.* of *Scotland*, to *William* Earl of *Angus*, whom the King designs, "Our richt traist Cousing *William*, now Earl of *Angus*, Lord *Douglas* and *Abernethie*, &c. and yan (i. e. then) of *Glenberrie* on the uyir (i. e. other) Part." Dated the 7th of March 1588.

Justice, in a judicial Proceeding, wherein he and his Wife's Brother, *Alexander*, had an Interest, would name the one Earl of *Sutherland*, and the other *Sanders* (i. e. *Alexander*); and that in all Law Deeds Men would treat him as Earl of *Sutherland*, if he was not truly such? The tenth Part of this Evidence was held good in the Peerage of *Cassils*, to prove the Creation of the Earl of *Cassils*, at the very same Period.—The direct Evidence is supported by the presumptive: For of the Parties who had any Connection with the Peerage upon Earl *John*'s Death, in the Year 1514, *Elizabeth* could not claim it, because her Brother *Alexander* was alive; or, though he had been dead, because the Law of the Land, the Investitures of the Estate, the Extinction of the Regality, upon the Extinction of the Heirs Male of the Marriage of those to whom it was granted, and the Example of her Father, who took the Peerage in Exclusion of his Niece *Marjory*, the Heir Female, showed that the Limitation of the Peerage was to Males; and she did not attempt it. For in her Service to her Brother, on relative Deeds, she assumed and got only the Title of *Elizabeth Sutherland*, but not that of Countess.—*Alexander* never claimed the Peerage, because either he, or his Brother had consented to its being transferred to *Adam*, or because it had been forfeited, or upon some other Account, which *post tantum temporis*, and the Possession of Centuries, it is not incumbent upon the Claimant to point out.—No Heir Male appeared, if any such did really exist.—*Adam Gordon* could not take by Descent; but it is certain he took, and therefore he must have taken by Creation.

Many Facts concur to prove the Creation of *Adam Gordon*; and the whole is fortified by this strong Circumstance, that his Grandson and great Grandson were served Heirs to him as Earl of *Sutherland*. They surely well knew under what Character to describe him, and had no Interest to describe him in a different one from that he had Right to, seeing it was more advantageous to them to aver, the one that his Grandmother; the other, that his great Grandmother, had the Peerage, than to aver that Earl *Adam* had it, because in the one View they were Heirs to an ancient Peerage; in the other, they were Heirs only to a modern one. This shews the Sense of the *Sutherland* Family with regard to Earl *Adam*'s Right to the Peerage; and the Claimant has also the Authority of a Judgment of the supreme Court of Law in *Scotland*, in Aid of the Proposition he has undertaken to maintain. The Court, in 1706, after a painful Inquiry, and having seen all the Evidence the Earl of *Sutherland* could collect, to prove the Peerage in *Elizabeth*, found there was no Ground to support that Conclusion.

R E A S O N II.

Reason II.

The Principle wherein the Claimant founds himself is supported by clear Authorities, being that which governed the solemn Determinations in the two Cases of the Earl of *Cassils* and Lord *Bothwick*, the same which had before regulated those of the Court of Session in the Case of Lord *Lovat*, and in the Question about Precedency between the Earls of *Crawfurd* and *Sutherland* in this Peerage, and that which directed the Lawyers of the Crown in the Case of an Heir Male of the Family of *Mordington*, who was indicted for High Treason at *Carlisle* in the Year 1746, and pleaded Privilege of Peerage.

O B J E C T I O N I.

Objection I.

Anciently all Peerages were territorial; or, in other Words, the Peerage was only an Appanage of the Land. The Title of Honour was understood to be so inseparably connected with the Territory, that when divested of the Estate of the Earldom, the Party ceased to enjoy the Dignity, of which there are two Examples, viz. the Earldom of *Wigton*, and the Dukedom of *Ross*. The only Method of conferring Peerages in *Scotland* originally, was by erecting certain Lands into an Earldom, and investing the Grantee in these Lands. The Charter in the Year 1312, by King *Robert I.* to his Nephew *Thomas Randolph*, proves this. The Erection of the Lands into a Dominium, created the Title of the Peer. The Limitation in the Investiture of the Land Estate therefore determines that of the Peerage. Upon this Principle the ten Peerages of *Lorn*, *Yester*, *Boyd*, *Ross*, *Fleeming*, *Glencairn*, *Errol*, *Home*, *Douglas*, and *Crawfurd*, went to Heirs Male, to the Prejudice of Heirs Female; as in all these Cases the Investitures of the Estate were to collateral Heirs Male, at the Time the last Peer died, without Issue Male of his Body. The Charter 1455 to Earl *John*, *Elizabeth*'s Grandfather, was to him *et heredibus suis*, which extended the Descent of both Estate and Peerage to Heirs General; her Brother, Earl *John*, served himself Heir on this Footing; she herself did the same; the Investitures of the Estate therefore were to her when the Peerage opened, and consequently the Peerage fell to her. The present Investitures of the Estate are to Heirs of Entail, and as these direct the Limitation of the Peerage, it must go to Lady *Elizabeth*, the Heir of Entail.

A N S W E R.

Answer.

It is impossible to ascertain with Precision the various Forms used in creating Peers in *Scotland* in ancient Times; neither does the Claimant think himself under a Necessity of investigating that Point.—His Ground stands firm, independent of any such Inquiry, and cannot be affected by the conjectural Argument, and Precedents still more uncertain, referred to in Lady *Elizabeth*'s Case. He will not, however, totally overlook them, but endeavour to prove that they by no Means conclude in Lady *Elizabeth*'s Favour.

The public Records of *Scotland* go no higher up than the Beginning of the 14th Century; there are many Chafms in them, and vast Numbers of Charters not contained in the Records. From the Evidence of those that remain, there is no Room to conclude that a simple Erection of a Land Estate, without special Words of Creation, could make a Man a Peer; neither is there any Thing whence to determine with Precision, the Antiquity of any particular Form of creating Peers in *Scotland*, so as to shew that one Form was more ancient than another. The Creation of Peers by Investiture in Parliament, appears to be as ancient as the Records of Parliament now extant (1), and the Mode of Creation by Patent may be as ancient, either as that

P R O O F S and A U T H O R I T I E S.

(1) Record of Parliament, Book ii. Fol. 57. Certified Extract of the Creation of Lord *Hume*, produced, dated 8th April 1473.—Records of Parliament, Book iii. Fol. 17. Anno 1476. Creation of the Lord of the *Isles*.—Certified Extract produced.—Records of Parliament, Book iv. Fol. 93. 17th October 1488.—Creation of the Earl of *Bothwell*, a certified Extract of which is produced. Patent, dated 21st July 1637, Book xxxv. N. 354. "Sciatis quia nos compertum habentes quod quondam noster illustrissimus attavus Jacobus tertius Dei gratia rex Scotorum perennis memorie per suas literas patentes sub suo magno sigillo de data apud Edinburgum vigesimo octavo die mensis Maii anno domini millesimo quadringentesimo octuagesimo octavo expeditas pro causis inibi specificat. dedit et contulit in quond. Alexandrum comitem de Glencairn dominum Kilmaurs predecessorem predilecti nostri consanguinei Willielmi nunc comitis de Glencairn domini Kilmaurs titulum honorem et dignitatem comitis de Glencairn domini Kilmaurs omni tempore a futuro nuncupand. prout dict. literæ patentes de data predict. latius propoant."—Certified Extract of the above produced.

by

by Charter of Creation or Investiture in Parliament, for the Ratification of the Patent of *Glencairn*, in the Year 1637, proves that that Peerage had been created by Patent as far back as the Year 1488. One of the most ancient Charters of Lands now on record, containing a Creation of a Peerage, is in the Rolls of *Robert I.* That Prince created his Brother *Edward Bruce*, Earl of *Carrick*, and gives him the Estate of the Earldom, *cognomine juri et dignitati comitis (m)*. These Words of Creation would have been nugatory and superfluous, if the bare Possession of the Estate by virtue of the Grant would have made *Edward* a Peer. There is another Instance of the same Sort in the Creation of the Earl of *Wigton* by King *David II.* only in this last the Lands had not before been called an Earldom (*n*). If the Evidence of the Records therefore were to determine this Point, Peerages of all Sorts are mere personal Grants, without any Relation to Lands whatever.

Lady *Elizabeth* owns, That Earls were known in *Scotland* as early as the Reign of *Malcolm III.* But it is certain that fifty Years before that Reign, viz. in the Reign of *Malcolm II.* there was a Chancery in *Scotland*, with all proper Officers and Forms (*o*), whence all the King's Grants issued in writing; and these Writings constantly describe the Limitations of the Grant. The Grants of Peerages, whether contained in a Charter or a Patent, or made good by Investiture in Parliament, were all vouched by written Instrument; and were, so far as it is possible to trace them, personal Grants, not territorial Consequences; and therefore the Succession to them was regulated, not by the common Laws of Descent in Lands, but by the Rule prescribed in the Grant, which from the Nature of Earldoms, both as Fiefs and as great Offices, were limited to Heirs Male. But if true, that there ever was a Period when Peerages were merely territorial, a Thing utterly incapable of Proof, the Appendage of the Dignity to the Land must have ceased the Moment that Proprietors of Land could alien during Life, or by Will after Death, or were subject to the Execution of their Lands for Debt: For suppose the Proprietor had given away, or sold off, or bequeathed by Will, his Earldom to twenty different Grantees, Purchasers or Legatees, To which of these twenty would the Peerage go that was attached to the Territory of the Earldom (*)?

~~The Cases of the Earldoms of *Wigton* (*p*), and *Murray*, and of the Dukedom of *Ross*, are altogether mistaken by Lady *Elizabeth*, as may be seen from the Note subjoined, where the Evidence stated proves, that the Sale of the Estate of *Wigton* to *Archibald Douglas* of *Galloway*, by *Malcolm Fleming*, designed in the Deed of Sale, alias *Comes de Wigton*, did not divest *Fleming* of the Peerage; and shews further, that *Archibald Douglas*~~

PROOFS and AUTHORITIES.

(*m*) Royal Charter, Roll i. N. 45; the 45th Charter in Number on Record.—Certified Extract is produced.

(*n*) *Crawford's* Peerage, p. 493, in which the Charter of Creation is translated *ad longum*.

(*o*) *Vide* Leges Mal. II. where this appears as clear as the Sun. One of the Lady *Elizabeth's* Tutors has lately published some ingenious Writings, to prove that these Laws of *Malcolm II.* are a Forgery, or at least wrote at a later Period; by the same Mode of artificial Argument, the Claimant could prove that *Magna Charta* was a Forgery, or composed some Centuries after its Date. The Claimant hopes, and does not doubt of his Cause being judged by those Laws, which the Lawyers, the Judges, the Parliaments, and the People of *Scotland*, have held to be authentic above Seven Centuries.

(*) The Limitation in the major Part of the Settlements of the Estate of *Sutherland*, as that of the Estates of most of the other Peers of *Scotland*, is in the last Termination to Assigns. The Investitures 1547, 1580, 1662 and 1681, are all to Assigns in the last Termination.

(*p*) Earl of WIGTON.

The Lady *Elizabeth's* Proposition, with regard to the Earldom of *Wigton*, is, That *Thomas Fleming*, Earl of *Wigton*, sold the Estate of *Wigton*, to *Archibald Douglas*, Knight of *Galloway*; and that immediately thereupon, *Archibald* became Earl of *Wigton*, which she attempts to prove by three Charters, in the 1371, 1375, and 1422, quoted in her Case, Page 8th, Note Letter S.

A N S W E R.

It is much more probable, that *Thomas Fleming*, Earl of *Wigton*, lost the Peerage by Forfeiture, or by Resignation into the King's Hands, *ad perpetuum remanentiam*, than that he was divested of it by Sale, and *Archibald Douglas*, Laird of *Galloway*, created a Peer by the Act of a private Man, conveying to him a Land Estate; a Sort of Creation unknown in the Law, and derogatory to the Honour of the Crown.

In the Charter confirming the Conveyance, of Date 7th October, Anno Regni Roberti II. (i. e. 1372) the King calls *Thomas Fleming*, *Thomæ Fleming*, alias *comes de Wigton*. In the Grant confirmed, it is true *Fleming* is called Earl of *Wigton*; but this is only a private Deed, and People forfeited are warranted by Custom, even at this Day, either to use or drop the Appellation of Earl, as they see fit. That *Thomas Fleming*, Earl of *Wigton*, had been forfeited is proved by a Charter, dated in 1372; by which it appears, he, as Laird of *Fullwood*, had impignorated the Lands of *Lenzie*, Part of the Family Estate of *Wigton*, to Sir *Thomas Boyd*, who conveyed his Right of Impignoration to *Malcolm Fleming* of *Biggar*. This appears from a Charter, dated 20th June 1374.

It appears from another Charter, dated the 18th April 1379, That *Robert Erskine*, who had got a Right to the Estate of *Lenzie*, (probably as the King's Donator to the Forfeiture of *Thomas Fleming*) conveyed a Part of those Lands to *Patrick Fleming*, Son of *Malcolm Fleming* of *Biggar*, getting from him in Exchange the Lands of *Dalnotter*. In the Charter, upon the Exchange there is the following Clause, which affords strong Evidence of *Thomas* Earl of *Wigton's* Forfeiture: "Et si contingat quod heredes antiqui baronie de Leygnech per tractatum pacis reformande inter regem Anglie & Scotie predictam baroniam de Leygnech tanquam hereditatem suam recuperaverint."

2do, *Archibald*, Laird of *Galloway*, never enjoyed the Peerage of *Wigton*; it passed to quite a different Person, and must necessarily have done so, in consequence either of a Resignation, or of a new Grant, after the Forfeiture of the Family of *Fleming*. For, in a Deed in *Rymer's Fœdera*, Tom. vii. P. 175, he is named immediately after the Earl of *Douglas*. The Words of the Deed are, *Williclmum comitem Douglas et de Marr*, *Archibaldum Douglas dominum de Galloway*. This Deed is dated in 1377; and by a Charter, dated 21st of September 1384, to the Son of this *Archibald*, he is designed, *William de Douglas*, Knight and Son domini *Archibaldi de Douglas militis domini Galwidie consanguinei nostri*.

Archibald Douglas, the Grantee in the above-mentioned Charter, cannot be the same Person who is mentioned in the Charter 1422, (quoted by the Lady *Elizabeth*) as Earl of *Wigton*, for the former *Archibald* is called by King *Robert II.* *Archibaldus de Douglas miles consanguineus noster*; whereas the *Archibald Douglas* Earl of *Wigton* is described in the Charter dated 8th January 1429, by King *James I.* to be *Nepos* or Nephew to that King, and consequently Great Grandson to *Robert II.* who would therefore, in the Charter, in the 1372, have given him that Designation, and not that of *consanguineus noster*.—Evidence, 1mo, Royal Charter, *Robert II.* Roll iii. N. 5. 7th of October, Regni 2do, 1372, to *Archibald Douglas*, Laird of *Galloway*. 2do, Royal Charter, Roll ii. N. 50. to *Thomas Boyd*, confirming a Charter, dated 1372. 3tio, Royal Charter, *Robert II.* Roll ii. N. 64. confirming a Charter to *Patrick Fleming* of *Biggar*, dated 18th April 1379. 4to, Royal Charter, *Robert II.* Roll viii. N. 20. dated 21st September, 14 Regni, 1384. 5to, Royal Charter, by *James I.* Book iii. N. 57. 8th January 1429.—Certified Extracts of the foregoing Charters are produced.

was never Earl of *Wigton*. The Duke of *Ross* (*r*) was created by Investiture in Parliament. And it was only an Estate that was granted to *Ranulph* Earl of *Murray* (*s*), who before the Date of that Grant has been created Earl of *Murray* either by Investiture in Parliament, by Patent, or in some other Form, according to the Mode of the Times in which he lived.

In every Charter of Erection whereby a Peerage is created, there is a personal Creation: The Charter does two Things; it creates a Man a Peer, and erects his Estate into a *Comitatus* or *Dominium*. *Ranulph* Earl of *Murray* therefore was not created a Peer by the Charter referred to by the Lady *Elizabeth*.

The Connection betwixt the *Comitatus* or *Dominium* and the Peerage, is so insignificant, that a Variety of Instances can be shewn where the *Dominium* itself is conveyed, and yet the Peerage does not follow the Grant (*q*). Lady *Elizabeth*'s Doctrine upon this Head would create a Number of Peerages which never were

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(*r*) Dukedom of ROSS.

The Lady *Elizabeth*'s Proposition with regard to the Dukedom of *Ross* is, That the Duke having resigned his Estate into the King's Hands, *ad perpetuam remanentiam*, reserved a Part of the Lands in order to preserve the Peerage.

ANSWER.

This Peerage was created by Investiture in Parliament, and certainly was not Territorial; the Record of Parliament is in the following Words: "*Parliamentum predict. continuatum fuit quotidie usque ad presentem diem viz. 29num diem dict. mensis Januarii anni prescripti 1487mi Et eod. die dominus rex creavit filium suum Jacobum secundo genitum ducem Rossie marchionem de Ormond comitem de Edirdale alias nuncupat Ardmanach dominum de Brechin et Navare &c. et concessit sibi terras dominiorum predict. cum pertinen. cum tenen. tenan. & libere tenen. servitiis & omnibus aliis pertinen. secundum tenorem cartarum & evidenciarum sibi desuper prius confectarum et nunc etiam conficiendarum.*" The Peerage of Lord *Hay of Yester*, and others, were created the same Day with this of the Dukedom of *Ross*.—Parliament Records, Book iv. Fol. 80.—Certified Extract produced.

The Duke of *Ross* must necessarily have been a Peer, and Duke of *Ross*, the Instant the King declared him such in the foregoing Record, and could not have been Duke before he was so declared; nor ceased to have been such, until his Right in the Estate was completed.

The Argument, therefore, drawn from the Duke's reserving the Mounts in his three Estates, to prove that he could not without doing so reserve his three Peerages, falls to the Ground. At this Day, it is very common in *Scotland*, when a Man sells a Family Estate, to reserve a Piece of old Wall, to preserve the Remembrance of his Antiquity, and indulge his Vanity. Legal Argument cannot be raised upon such Foundations.

(*s*) RANULPH Earl of MURRAY.

The Proposition Lady *Elizabeth* maintains upon the Charter to *Ranulph* Earl of *Murray*, (transcribed in the Cartulary of *Murray*) is, that *Ranulph* was not an Earl before the Date of that Charter, for in the beginning thereof he is styled *miles*; but that immediately after the Clause which declares that the Lands shall be held "*in libero comitatu*," *Thomas Randulph* is styled *Comes*.

ANSWER.

The Reasoning is childish, *Ranulph*'s being styled *Miles* in the Beginning of the Charter is no Proof that he was not an Earl. *Miles* was then and long after a Dignity which even Kings obtained, *vide Robertson's History of Charles V.* Vol. i. p. 70. There are many Instances in the Records of *Scotland*, of Peers who had the Title of *miles* adjoined to that of Earl. There is one mentioned in this Case, in the Note (*i*). Page 20. Instance *Strathern*, in a Charter to *David* Earl of *Strathern*. There is the strongest Reason to presume, in this particular Case of the Earl of *Murray*, That in transcribing the Charter into the Cartulary, the Writer has inadvertently omitted Earl *Ranulph*'s Designation in the first Part of the Charter. When he is first designed *comes*, it is by an Expression which refers to a former Part of the Charter where he has been designed Earl; for he is characterised by the words *dictus comes*, Words plainly referring to the Name Earl, which had formerly been given him in the Charter. It hath already been observed, that Peerages were originally of the Nature of Offices, and were personal Grants flowing immediately from the Act of the Sovereign. In whatever Manner he was created, whether by Investiture in Parliament, or by a Patent in a Charter of Lands, the Instant the King declared him to be a Peer, he thenceforth became such. Most commonly the Estate of the Peer was erected about the same Time, he was created into a *Comitatus* or *Dominium*, denominated after the Peerage; but that Erection was the Business of Chancery, and not of the King or Parliament.—The very Term *dictus comes* is destructive of Lady *Elizabeth*'s territorial Principle, That the Investiture in the Estate gave the Peerage. *Ranulph*, by this Charter, not having been sealed in the Earldom, ought not to have been called Earl in the Charter. The Creations of *Edward Bruce*, Earl of *Carrick*, and *Malcolm Fleming*, Earl of *Wigton* above-mentioned, Creations about the same Period, confirm this Hypothesis. An authenticated Copy is produced of the Charter contained in the Cartulary, Advocates Library, A. i. 40. Fol. 91 & 92.

Withdale.

(*q*) By Charter, Book xxxv. N. 398. dated 5th June 1581, *James VI.* grants the Earldom of *Morton*, to *John Lord Maxwell*, "*Omnes et singulas terras, comitatum, et regalitatem, de Morton.*" Yet he is not thereby made a Peer, for on the contrary, on the 29th of October 1581, he got a Patent from the Crown, creating him Earl of *Morton*.—Evidence Patent to *Robert Lord Maxwell*, creating him Lord *Nithisdail*, dated 29th August 1620, which proves this last Fact. Book xlix. N. 290.—Certified Copy produced.

Arran.

On the 22d April 1581, *James VI.* grants the Earldom of *Arran*, to Captain *James Stewart*, "*Totum et integrum comitatum Arraniæ.*"—Evidence, Royal Charter, Book xxxv. N. 364. dated 22d April 1581.—Certified Copy produced. Yet he is not thereby Earl of *Arran*: For, on the 8th of October 1581, the King gives him a Patent, creating him Earl.—Evidence, Patent, Book xxxv. N. 454. dated 28th October, 1581.—Certified Copy produced.

Carrick:

In Page 32. Note *b*. it is shewn, that *Robert Bruce* the Father was Earl of *Carrick* in the Years 1293, 1294 and 1296 and yet, at the first of these Periods, the *Comitatus* went from him to his Son upon his the Father's Resignation.—Evidence, *Rymer*, Vol. ii. p. 614.

Wigton.

It was proved Page 24. Note *p*. in this Case, That *Thomas Fleeming*, Earl of *Wigton*, sold the *Comitatus* of *Wigton*, in the Year 1371, to *Archibald Douglas*, and yet *Archibald* did not thereby become a Peer.

Fife,

On the 8th June 1362, *David II.* gave an original Grant of the *Comitatus* of *Fife*, to *Thomas Bisset*.—Evidence, Charter of that Date, "*Dilecto et fideli nostro Thome Bisset militi totum comitatum nostrum de Fife.*"—Evidence, Royal Charter, Book i. N. 62. dated 8th June, Anno Regni *David* 34. Certified Extract produced. *Thomas Bisset* and his Wife continued Commoners in the Year 1366.—Evidence, Royal Charter, Book i. N. 125. Anno Regni *David* 36. Certified Extract produced of a Charter, 17th April that Year, "*Omnibus hoc scriptum visuris vel auditoris Thomas Bisset dominus de Upschynnton salutem in domino sempiternam noveritis nos dotasse Ysabellam de Fyf dominam ejusd.*" In the 13th a Warrant of *Edward III.* runs thus: "*Cum delectus et fidelis noster Thomas Bisset de Scotia—suscepimus ipsum Thomam ac homines, terras et tenentes suos in Upschynnton, Lambden et Kymbrynham, in protectionem et defensionem*"

were created; there being many Instances of *Dominia* in Charters, and yet Peerages of such Denominations never were heard of (*r*). The Territory is not even a Consequence of the Title of Honour, but for the most Part a Concomitant of it; and often not even that, there being many Instances of mere personal Peerages, as those of the Earls of *March* and *Marisball*, which behoved to have been originally official. Some have their Titles from Towns, as the Earl of *Dunbar*. Others, and very ancient ones, wherein the Peer is not designed from Lands or Territory, but Earl simply, without Addition but that of his Name; thus, *Duncan comes*, *Malise comes*, whereof are many Examples in *Anderson's Deplomata Scotiæ* (*s*). Some of those very Peerages (*) which Lady *Elizabeth* has brought as Precedents for supporting her territorial Principle, afford the strongest Proof against it: For although the Peer had the Estate whence the Peerage took its Name, yet he is not at the Pains to get it erected into a *Comitatus* or *Dominium*, till long after the Creation of the Peerage; leaving it on the common Foot of a Barony.

Lands always go, in the Course of Descent, to the Heir of the Person last seised. An Heir taking by Descent, must be served Heir in special to the Person last seised, thereby becoming his Representative without Connection with any preceding Owner: But Dignities require no Service for transmitting them; they pass by Operation of Law, and every Successor to the Dignity takes as Heir to the Person last ennobled, and as descended from him, not as connected with the last Successor (*t*). It happened in several of those Peerages which

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"*stram specialem*." *Rymer*, Tom. vi. p. 129. In the Year 1366, he continues still a Commoner, for in a Pass granted to him by *Edward III.* in that Year, he is designed, "*Thomas Byset de Scotia cum duobus sociis equitibus*." *Rymer*, Tom. vi. p. 497.

The *Comitatus* of *Buchan*, prior to the 12th *March* 1406. had been transferred to *John*, Son to *Robert* Duke of *Albany*, when Regent of *Scotland*; yet he continued a Commoner.—Evidence, a Charter from his Father to him of that Date, Roll ii. N. 16. "*Robertus dux Albanie comes de Fyfe & de Monteth ac gubernator regni Scotiæ—sciatis quod concessimus carissimo filio nostro Joanni senescallo domino de Buchane*."—Certified Extract produced. In the 1407, he still continued a Commoner.—Evidence, another Charter to him, 2d *May* that Year, by his Father, "*Carissimo filio nostro Joanni senescallo domino de Buchane*." Roll xi. N. 19.—Certified Extract produced. But in the 1413, he was Earl of *Buchan*, having before that Time been created Earl.—Evidence, another Charter of the 6th *November* that Year, by the same Duke of *Albany* to him, of the same Lands, "*Carissimo filio nostro Joanni senescallo comiti Buchanie*." Roll xii. N. 27.—Certified Extract produced.

Sir *Robert Gordon* has confined himself to these six Instances, as being sufficient to prove, that the Transference of the *Comitatus* transferred not the Peerage; they are amongst the most ancient Peerages of which the Record can be discovered, and a hundred more modern Instances might be produced. Upon the Reformation, many of the Church Lands were erected about one Time into temporal Lordships: These have past from Hand to Hand, yet the Peerage past not with them. It is equally certain, that as far back as the Evidence of the Records of *Scotland* goes, Earldoms and Lordships, that is to say, the Land Estate of the Earl or Lord erected into an Earldom or Lordship, past from Hand to Hand, yet the Grantees Purchasers or Legatees never dreamt that the Investiture of the *Dominium* in their Persons vested them in the Peerage, to which that *Dominium* was once only by Accident an Adjunct.

(*r*) A Multitude of Instances might be given of *Dominia* conveyed in Charters, which never yet had any Peerage attending them at all. A few shall be pointed out.

Dominium of *Sky*.—Evidence, Charter to the Earl of *Ross*, Book i. N. 258.

Dominium of *Glendowachy*.—Evidence, Charter to the Earl of *Buchan*, Book xxx. N. 139.

Dominium of *Strathbolgy*.—Evidence, Charter to the Earl of *Huntly*, Book iv. N. 106.

Dominium of *Buchquidder*.—Evidence, Charter, Book xxii. N. 126.

Dominium of *Ewisdale*.—Evidence, Charter Book xxvi. N. 173.

Certified Excerpts of the foregoing Charters are produced.

(*s*) *Anderson's Deplomata*, N. 11, 17, 23, 24.

(*) Lord INNERMEATH.

1. Royal Charter, 8th *May* 1478, Book viii. N. 114. "*Dilecto consanguineo nostro Waltero domino Innermeith de totis et integris terris suis de Innermeith, viz. de sexta parte baronie ejusd. jacen. infra vic. nostrum de Perth*."

2. Lord *Hume*, Royal Charter, 4th *February* 1509, Book xv. N. 163. "*Consanguineo et concilario nostro Alexandro domino Hume omnes et singulas terras et baroniam de Hume*." Charter 22d *June* 1535, to *George* Lord *Hume*, of the Barony of *Hume*, Book xxvi. N. 173. and in the other subsequent Charters, the Estate is called a Barony, though its Proprietor took his Title by the Name of it.

3. The Peerage of *Yester* was created 20th *January* 1487—Evidence, Certified Extract, Record of Parliament produced. On the 10th of *November* 1512, the Estate of *Yester* continues a Barony—Evidence, Charter *James IV.* Book xviii. N. 129. —"*Joanni domino Hay de Yester totam et integram dimidietatem terrarum baronie de Zester*." But in the 1590, the Estate of *Yester* was erected into a *Dominium*.—Evidence, Charter, penult. *February* that Year, Book xxxviii. N. 281. *James VI.* to *William* Lord *Hay* of *Yester*.

4. The Peerage of *Boyd* was created some Time before the 1548—Evidence, Charter of Confirmation by *Robert* Master of *Boyd*, 11th *February* that Year, Book xxx. N. 426. The Estate of *Boyd* was not erected into a *Dominium* till 1591.—Evidence, Case of Lady *Elizabeth*, Page 11th, Letter A. Instance *Boyd*, Charter 12th *January* 1591, erecting the Estate of this Family into a Lordship in favour of *Thomas* Lord *Boyd*, and the Heirs Male of his Body.

5. The Peerage of *Ross* was created before the 1499—Evidence, Charter, Book xiii. N. 456. 25th of *August* that Year, by *James IV.* confirming a Charter, "*fact. per dilectum consanguineum nostrum Joannem Dominum Ross de Hawkhead*." In the 1508, the Estate of *Melville* continues without being erected into a Barony or *Dominium*.—Evidence, Charter, Book xv. N. 75. dated the 21st of *February* 1508, to *John* Lord *Ross*, in these Words: "*Villam et terram de Melville*;" but in the Charter referred to in Lady *Elizabeth's* Case, Page 11th, Letter A. Instance 4th, there is a *Dominium* in the Family called *Melville*, 13th *September* 1548. Certified Extracts are produced of all the Charters referred to in the foregoing Five Cases.

(*r*) But the Lady *Elizabeth*, in her Case Page 4. endeavours to establish a contrary Principle; and as a Proof that Peerages do not pass from Ancestor to Heir without a Service, brings Two Precedents to prove her Proposition. The First is in the Case of *Elizabeth*, the Wife of *Adam* Earl of *Sutherland*; and the other, in that of her Brother, Earl *John*. The Reason why *Elizabeth* did not take the Title of Countess in her Service was, as has already been shewn, because she knew she had no right to it. And with regard to the other Case, it is equally incapable of supporting the Proposition: For though it is true, that Earl *John*, in his Seafine, is only designed *John Sutherland* simply; yet that could only proceed from the Inaccuracy of the Person who wrote the Instrument. For in an Account rendered into the Exchequer by the Bishop of *Caithness*, 6th *September* 1510, for the Rents of the Estate of the Earldom of *Sutherland*, he is therein designed, *John* Earl of *Sutherland*, full Two Years before he was served Heir to his Father therein. Roll of Exchequer, 6th *September* 1510.—Certified Extract produced.

Another Instance of the same Sort occurs in the Case of Earl *John*, the Grandson of *Adam* and *Elizabeth*: For this Earl was, on the 4th of *May* 1546, served Heir in special to his Father *Alexander* in the Earldom of *Sutherland*; yet he sat in

which the Lady *Elizabeth* has selected to prove her Proposition, that the Estate of the Peer went to the Heir Male, because the great *Scots* Families had a Predilection to Heirs Male. On this accidental Circumstance she attempts to raise a Principle to her Purpose; but the Principle fails from Want of legal Foundation when applied to the Facts: For in some of the Cases referred to, the Estate did not go to Heirs Male, though the Peerage did: And there are many Precedents where, though the Heir Female took the Estate, yet, by the Failure of Heirs Male, the Peerage extinguished (*). There are several Instances in other Peerages not referred to by Lady *Elizabeth*, where the Estate, did not go to Heirs Male and yet the Peerage did. *Elizabeth's* Service and Title to the Estate will be considered hereafter.

Objection 2d.

OBJECTION II.

The Descent of a Peerage, whose original Limitation is unknown, but the Peerage created by Patent, is governed by different Principles from the Descent of a Peerage created by Investiture in Parliament, or by Erection of Lands into an Earldom, &c. for the Descent of a Peerage created by Patent must be determined by a legal Presumption in favour of the Heir to whom the Land Estate stood limited at the Time of the Creation. Hence the Earldom of *Cassils* was decided in favour of the Heir Male, it being clearly proved, that *David Kennedy* was created by Patent in 1509, and could not have been created by Investiture in Parliament, or have got the Peerage in any other Manner; and it was likewise proved, that the Land Estate of the Earl of *Cassils* stood limited to Heirs Male at the Time of the Creation of the Peerage.

Answer I.

ANSWER I.

The Principle directing the Judgment in the Case of the Earldom of *Cassils* will hereafter be shewn very different from that here assumed. The Objection is founded on a Fact not proved, nor indeed capable of Proof, that *David Lord Kennedy* was not created Earl of *Cassils* by Investiture in Parliament in 1509. The Records of Parliament, at the Period of Time when it is said his Creation must have appeared,

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Parliament as Earl of *Sutherland*, Three Years before the Date of that Service, viz. on the 4th December 1543. 1mo, Retour of the Service of *John Earl of Sutherland*, 4 May 1546, produced by the Lady *Elizabeth*. 2do, Roll of Parliament, 4 December 1543; a certified Extract of which is produced.

The Case of *John Earl of Glencairn* likewise affords a Precedent against this Proposition. *Alexander Earl of Glencairn* died on the 5th of May 1670, his Brother *John* was not served Heir to him in the Earldom till the 9th of September thereafter but he sat in the Parliament of the 2d July 1670. Retour of *John Earl of Glencairn* to his Brother *Alexander*, 9th September 1670. Roll of Parliament, 2 July that Year.—Certified Extracts of both are produced.

Numberless other Instances of this Sort might be produced; but it seems quite unnecessary to multiply Proofs, to establish so clear a Point as that of Peerages passing without Service.

There was a Period, betwixt the Junction of the Two Crowns and the Union of the Two Kingdoms, during which most of the *Scots* Nobility were low in their Fortunes. During this Period many of them did not serve themselves Heirs to their Ancestors, because, if they had been served, they must have been subject to their Debts, if the Lady *Elizabeth's* Argument on this Head were well founded, the Parliament of *Scotland* was, during a Century, filled with Men, many of whom had no Right to sit there.

(*) FLEEMING.

The Investitures of this Estate were not to Heirs Male, and yet the Peerage went to them. *Malcolm Lord Fleming* had Two Sons, *James* and *John*.—Evidence, Royal Charter, dated 19th November 1541, Book xxviii. N. 75. Royal Charter, 17th January 1557, Book xxxi. N. 578. This *James* had a Daughter named *Jean*, who got the Family Estate of *Thankerton* and *Biggar*.—Evidence, Royal Charter, penult. October 1583, Book xxxv. N. 849. “Magistro Joanni Maitland de Thirlestoun et magistræ Jeannæ Fleming suæ sponsæ Quæquidem omnes et singulæ terræ baronia et annuus redditus res spective prædictæ cum partibus et pertinentiis earundem præfatæ magistræ Joannæ Fleming nepti et hæredi quondam *Malcolm* coemi Domini Fleming sui avi.” That *John* succeeded in the Peerage in Preference to *Jean* the Heir of Line, is proved by a Royal Charter, dated the 18th of January 1588, Book xxxviii. N. 292. “Dilecto nostro consanguineo Joanni Domino Fleming.”

LENNOX.

2. The Lady *Elizabeth* says, the Dukedom of *Lennox* was created by King *James VI.* in favour of *Esme Duke of Lennox* and his Heirs Male; which accounts for a Female not taking the Peerage. The Charter she founds upon to prove this is dated 13th December 1581, Book xxxv. N. 508.

All this is a Mistake; *Esme* was created a Duke on the 5th of August preceding by a Creation, entitled, “Constitution of the Earldom of *Lennox* in a Dukerie,” produced, copied from the Earl of *Haddington's* Collections from the Records in the Advocates Library at *Edinburgh*, A. 4. 20. Fol. 460. In consequence of this Creation, he sat in Parliament as Duke of *Lennox* 28th November 1581.—Evidence, Extract Roll of Parliament produced. But the Charter founded upon by Lady *Elizabeth* is posterior to both these Periods, and instead of being the Creation of a Peerage, is only the Erection of the Estate into a Dukedom. The Proofs of the Exclusion of the Heir Female in this Case, consist of two Retours. 1mo, Retour of King *Charles II.* as Heir Male to *Charles Duke of Lennox*, dated the 6th Day of July 1680.—Record of Retours, Book xxxvii. Fol. 212. 2do, General Retour of *Catharine Stewart*, “Dominæ Obrien et Baroneßæ de Clifton,” to her Brother *Charles Duke of Lennox*, dated 14th December 1678.—Record of Retours, Book xxxiv. Fol. 140.—Certified Extracts of the above Retours are produced.

SEMPILL.

3. It has been shewn, Page 18. Note (i): That the Estate of *Robert Lord Sempill* went to his Daughter, and that, in order to make the Peerage go to her, which otherwise opened to the Heir Male, he resigned his Right in the Peerage in her Favour.

BORTHWICK.

4. It has been shewn, Page 19. Note (i). of this Case, That *John Lord Borthwick* left an Heir of Line, *John Dundas*, who got the Estate of which he died possessed: For as to the ancient Estate of *Borthwick* itself, it is well known, and will not be denied, it was purchased by Sir *James Dalrymple* of *Borthwick*, and a Number of other Persons.

CAITHNESS.

5. It is well known, and will not be denied, that the late Earl of *Caithness* left not his Estate to either of his two Heirs Male who are now contending for his Peerage.

if he had been created by Investiture in Parliament, are lost (y): But although they had been extant for the Year 1509, his Creation not appearing therein, could not afford even the slightest Ground of Presumption that he was not created in Parliament. Any Person who will take the Trouble to inspect the Books of Parliament, and compare what he there finds recorded with what is related by Historians concerning the Business transacted in Parliament during the same Periods, will find, that much Business was done in Parliament that does not appear from the Parliamentary Records. And if it were true that the Determination in the Earldom of *Cassils* was founded upon a legal Presumption, arising from the Limitations of the Land Estate at the Time of the Creation, it would in many Cases put it in the Power of the Party who makes the Claim to determine his own Cause. For if the Heir Male who had the Estate and Writings made the Claim, then he would produce from his Charter Chest only those Parts of the original ancient Investitures which shewed the Estate limited to Heirs Male; and if the Heir Female who had the Estate and Writings made the Claim, she would produce from her Charter Chest only those Parts of the original ancient Investitures which shewed the Limitation of the Estate to Heirs Female.

There are a Variety of Instances (z) where the Estate stood limited before, at, and soon after the Creation of the Peerage simply *hæredibus suis*, or *hæredibus quibuscunque*, in which either the Heir Male succeeded to

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HALIBURTON.

6. It has been shewn, Page 20. Note (i). of this Case, That *Patrick Lord Haliburton*, upon whose Death without Issue Male this Peerage became extinct, left Daughters Heirs Portioners in his Estate.

HARRIS.

7. It has been shewn, Page 20. Note (i). of this Case, That *William Lord Harris*, upon whose Death without Issue Male his Peerage became extinct, left Daughters Heirs Portioners in his Estate.

MURRAY.

8. It has been shewn, Page 20. Note (i). That upon the Death of the Regent *James Earl of Murray* without Heirs Male his Peerage became extinct, and that he left Daughters who were Heirs to him in his Estate.—Further Evidence, Charter by King *Henry* and Queen *Mary*, 1st June 1566, which shews, that the Earl of *Murray* had resigned the Earldom (i. e. his Land Estate) in favours of his Heirs of Line, and failing them to his Assigns. Records of Privy Seal, Book xxxv. Fol. 34.—Extract Royal Charter of the above Date produced.

(y) Certificate by the Keeper of the Records produced.

(z) YESTER.

1. The Peerage of *Yester* was created in the 1487.—Evidence, Records of Parliament, Book iv. Fol. 80. 29th January 1487, produced. The Investitures of the Estate in 1451 stood "*hæredibus suis*."—Evidence, Charter by *James II.* 12th Jan. that Year, Book iv. N. 162. to *David Hay of Yester*, Knight.—On the 20th Sept. 1500, they stood also "*hæredibus suis*."—Evidence, Charter by *James IV.* of that Date, Book xiii. N. 424. to *John Lord Hay of Yester*. On the 2d of Feb. 1511, they stood also to Heirs Male.—Evidence, Charter of that Date, *James IV.* to *John Lord Hay of Yester*, "*et hæredibus suis*." On the 10th November 1512, they stood also "*hæredibus suis*."—Evidence, Charter of that Date, by *James IV.* to *John Lord Hay of Yester*, "*et hæredibus suis*," Book xviii. N. 229. On the 18th October 1533, they stood also to Heirs Male.—Evidence, Charter by *James V.* of that Date, to *John Lord Hay of Yester*, and *Margaret Livingstone* his Spouse, "*et hæredibus inter ipsos legitime procreat. seu procreand. quibus deficient. legitimis & propinquieribus hæredibus dicti Joannis quibuscunque*." Book xxv. N. 54.—Certified Extracts of the above Charters are produced. This last Charter deserves particular Attention, because it marks the Opposition betwixt *hæredibus* and *heredibus quibuscunque*, plainly importing that the former are Heirs Male, and the latter Heirs of Line. The same Observation will apply to the Limitations of several other Charters hereafter to be mentioned.

Lady *Elizabeth* quotes a Charter in 1590, in which the Lands and Barony of *Yester* are granted to *William Lord Hay of Yester*, and Heirs Male therein mentioned; but this was above a Century after the Creation of the Peerage, and only shews that one of the Heirs in the Peerage had altered the original Investitures of the Estate.

BOYD.

2. Robert *Boyd* was created a Peer some Time betwixt the fifth and seventh Years of Queen *Mary's* Reign.—Evidence, Charters, 18th February, in the fifth Year of that Queen, in which *Robert Boyd* is called a Commoner; and of 11th February, in the seventh Year of the Queen, in which he is called a Peer, Book xxx. N. 426. The Investitures of the Estate on 8th Feb. the fifth of the Queen's Reign, stood "*hæredibus inter ipsos, legitime procreat. seu procreand. quibus deficient. legitimis et propinquieribus hæredibus seu assignatis dicti Roberti quibuscunque*."—Evidence, Book xxx. N. 426. Royal Charter quoted above 18th February, in the fifth Year of the Queen's Reign. On the 14th of October 1550, the eighth Year of Queen *Mary*, *Robert Boyd* takes Investitures of an Estate to himself, "*suis hæredibus et assignatis*."—Evidence, Charter, Book xxx. N. 460. Royal Charter of that Date. In the 1573, *Robert Lord Boyd* takes Investitures "*hæredibus suis et assignatis quibuscunque*."—Evidence, Charter, Book xxxiv. N. 53. by *James VI.* 11th March that Year. In the 1575, *Robert Lord Boyd* acquired the Bailliewick and Justiciary of the Regality and Barony of *Glasgow*, taking the Limitation to himself, "*et hæredibus suis masculis de corpore ejus*;" just in the same Way as the *Sutherland* Family took the Limitations of the Sheriffship of *Sutherland* from the *Huntly* Family.—Evidence, Royal Charter, Book xxxiv. N. 246. 28th March of that Year. On the 13th Year of Queen *Mary's* Reign, *Robert Lord Boyd* takes the Investitures of the Estate "*hæredibus suis et assignatis*."—Evidence, Royal Charter in that Year, 10th December, Book xxxv. N. 126.—Extracts of the Charters above stated are produced.

Lady *Elizabeth* states a Charter dated 12th January 1591, in which *Thomas Lord Boyd* takes a Grant of his Estate to himself, and the Heirs Male therein mentioned; but this was near Half a Century after the Creation of the Peerage.

ROSS.

3. This Peerage was created between the 1472 and 1499.—Evidence, Charter by *James III.* *Joannem le Ross* *Haulkhead* militem, dated 9th March 1472, Book vii. N. 2241, dated Charter by *James IV.* dated 25th Aug. 1499, Book xiii. N. 436. confirming a Charter "*per dilectum consanguineum nostrum Joannem dominum Ross de Halkhead dilecto nostro Joanni Ross de Malevin militi suo hæredi apparen*." In 1490, the Investitures of the Estate of *Ross of Melvil* stood "*hæredibus inter ipsos, &c. Quibus forte deficientibus legitimis et propinquieribus hæredibus dicti Joannis quibuscunque*."—Evidence, Royal Charter, Book xii. N. 234. 27 September that Year. In the 1499, the Investitures of the Estate of *Lord Ross* stood "*hæredibus suis et assignatis quibus (quod absit) deficientibus veris legitimis et propinquieribus hæredibus suis quibuscunque*."—Evidence, Charter, 25th August of that Year, Book xiii. N. 456. In 1501, the Investitures of this Family are "*hæredibus suis*."—Evidence, Royal Charter, 11th March of that Year, Book xiii. N. 490. In 1502, the Investitures of this Family stood limited "*hæredibus suis et assignatis*."—Evidence, Royal Charter, 5th March of that Year,

to the Peerage in Exclusion of the Female Heir of Line, or the Peerage became extinct by the Failure of Heirs Male. These shew the Weakness of Lady Elizabeth's Principle, and that the present Peerage should

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Year, Book xiii. N. 573. In 1505, the Investitures of this Family continued limited "*hæredibus suis et assignatis*."—Evidence, Royal Charter, dated 12th February in that Year, Book xiv. N. 178. In 1508, the Investitures of the Family stood limited "*hæredibus suis*."—Evidence, Charter, 21st February that Year, Book xv. N. 75.—Certified Extracts of the above Charters are produced.

Lady Elizabeth quotes a Royal Charter, dated 13th September 1548, in which the Investiture had been taken to James Son to Ninian Lord Ross, and his Heirs Male; but this was Half a Century after the Creation of the Peerage.

FLEEMING.

4. The Peerage of *Fleeming* was created some Time between the 1451 and 1472; for in a Charter in the first of those Years, by King James II. Robert Fleming of Biggar is designed, *dilectum nostrum Robertum Fleeming de Biggar*; and in a Charter by King James III. that King confirms a Grant "*dilecto nostro Malcolmum Fleeming filio et hæredi apparenti dilecti consanguinei nostri Roberti domini Fleeming*."—Evidence, Royal Charter, 31st March 1451, Book iv. N. 221. Royal Charter, 31st August 1473, Book vii. N. 246. The Investitures of this Family in the 1496 stood limited "*hæredibus inter ipsos &c. quibus deficien. veris legitimis et propinquieribus hæredibus dicti Joannis quibuscunque*."—Evidence, Charter, dated 5th May that Year, Book xiii. N. 280. In 1509, the Investitures of the Family stood *hæredibus suis*.—Evidence, Charter, 8th May that Year, Book xvii. N. 68. In 1516, the Investitures of the Estate of this Family stood *hæredibus suis*.—Evidence, Royal Charter, 26th October that Year, Book xix. N. 81. In 1525, the Family Investitures stood *hæredibus suis et assignatis*.—Evidence, Royal Charter, 12th August that Year, Book xxi. N. 160. In 1527, the Investitures of the Family are limited "*hæredibus inter ipsos quibus deficien. legitimis propinquieribus hæredibus dicti Malcolmum quibuscunque*."—Evidence, Royal Charter, 28th October that Year, Book xxii. N. 111. In 1527, the Investitures of the Family are *hæredibus suis et assignatis*.—Evidence, Royal Charter, 8th August 1527, Book xxii. N. 38. In 1531, the Investitures of this Family continue limited *hæredibus suis et assignatis*.—Evidence, Royal Charter, 16th October that Year, Book xxiv. N. 121. In 1534, the Investitures of the Family continue *hæredibus suis et assignatis*.—Evidence, Royal Charters, 8th May, Book xxv. N. 133. 1st July, Book xxv. N. 142. and 2d November that Year, Book xxv. N. 160. The same Limitation in the Investitures of this Family continues in the 1535.—Evidence, Royal Charter, 26th September that Year, Book xxv. N. 275. In 1537, the Investitures of the Family were "*hæredibus inter ipsos legitime procreatis quibus deficien. legitimis et propinquieribus hæredibus quibuscunque*."—Evidence, Royal Charter, 11th July that Year, Book xxvi. N. 18. In 1538, the Limitations of the Investitures is *hæredibus suis*.—Evidence, Royal Charter, 9th April that Year, Book xxvi. N. 150. In 1539, the Limitation of the Estate of this Family is "*hæredibus inter ipsos quibus deficien. legitimis et propinquieribus hæredibus et assignatis quibuscunque*."—Evidence, Royal Charter, 22d April 1539, Book xxvi. N. 281. In 1541, the Investitures stand *hæredibus suis*.—Evidence, Royal Charter, 18th June that Year, Book xxvii. N. 233.—Certified Copies of the above Charters are produced.

GLENCAIRN.

5. The Peerage of *Glencairn* was created in the Year 1488, by Letters Patent of that Date.—Evidence, renewed Patent, of Date 21st July 1637, Book lv. N. 354. In 1511, the Investitures of the *Comitatus* and Barony of *Glencairn* stood to Heirs Male. This is the first Charter on Record of the Investitures of the Family Estate, and as it limits by express Name the *Comitatus hæredibus suis*, it destroys at once all the Lady Elizabeth's fine-spun Argument, That the Presumption for determining the Limitations of the Peerage arises from the Limitation of the Estate in the Investitures approaching nearest to the Time of the Creation of the Peerage. The same Observation will apply to sundry Peerages that are to follow.—Evidence, Royal Charter of the *Comitatus*, 24th July 1511, Book xvii. N. 86. *hæredibus suis*. On the 20th July 1551, Book xxx. N. 646. Investitures stood "*hæredibus suis et assignatis pluribus aut uni*."—Evidence, Royal Charter, of that Date, to Alexander Earl of *Glencairn*. In the Year 1552, the Investitures stood in the same Way.—Evidence, Royal Charter, Book xxx. N. 650. 8th December that Year, to Alexander Earl of *Glencairn*, *suis hæredibus et assignatis*. In 1553, the same Limitation, *hæredibus suis et assignatis*, continues.—Evidence, Royal Charter, Book xxxi. N. 96. 31st March that Year. In 1581, the Limitation in the Investitures of the Family is "*hæredibus inter ipsos quibus deficientibus hæredibus et assignatis dicti nostri consanguinei quibuscunque*."—Evidence, Royal Charter, Book xxxv. N. 459. dated 5 June that Year.—Certified Extracts of the above Charters are produced.

It is true, as stated by the Lady Elizabeth, that there is a Charter, 27th July 1642, limiting the Lands and Barony of *Kilmawers*, "*Willielmo domino Kilmawers hæredibus suis masculis et tallæ*." But at that Time the Peerage of *Glencairn* had subsisted for above a Century and a Half.

ERROL.

6. The Earldom of *Errol* was created about the beginning of the 15th Century. The earliest Charter, which Sir Robert Gordon can find on Record, of any Part of the Estate of *Errol*, is on the last January 1466, and limits the Estate "*hæredibus inter ipsos quibus forte deficientibus veris legitimis & propinquieribus hæredibus dicti Nicholas quibuscunque*."—Evidence, Royal Charter, Book vii. N. 105. of that Date. In 1510 the Investitures of the Family are, *hæredibus suis*.—Evidence, Royal Charter, Book xvi. N. 30. dated 10th February that Year. In the 1512, the Limitation in the Investitures continues *hæredibus suis*.—Evidence, Royal Charter, Book xviii. N. 75. dated 17th June that Year. In 1521, the Investitures continue under the same Limitation.—Evidence, Royal Charter, Book xx. N. 107. dated 21st March that Year. In 1530, the same Limitation continued, *i. e. hæredibus suis*.—Evidence, Royal Charter, Book xxiv. N. 1. 1st October that Year.—Certified Extracts of the above Charters are produced.

It is admitted, that there is a Charter, 10th April 1546, limiting the Estate of *Errol* to the Heirs Male of Andrew Hay Master of *Errol*, Son and apparent Heir of George Earl of *Errol*; but it is to be remarked, that the Peerage of the Earldom of *Errol*, had then subsisted for above a Century.

Earl of DOUGLAS.

7. Sir Robert Gordon has not been able to ascertain the Time of the Date of the Creation of this ancient Peerage; but the first Charter he has discovered on Record, of any Part of the Estate of this Family, is in 1370, the Limitation of which is "*Willielmo comiti de Douglas et hæredibus suis et assignatis*."—Evidence, Royal Charter of King David II. 14th January, Anno Regni 40. Roll i. N. 245. In 1373, the same Limitation, "*hæredibus suis et suis assignatis continues*."—Evidence, Royal Charter, Roll ii. N. 47. of Robert II. Anno Regni 3. There is another Charter, Roll iii. N. of the same King Robert II. without a Date, the Limitation in which is "*Willielmo comiti de Douglas et hæredibus suis*." In 1426, the ancient Barony of *Bothwell*, on which the Earls of *Douglas* used to reside, and a very large Estate, is limited "*Archibaldo & Eufamie sponse sue et eorum alteri diutius viventi ac hæredibus inter ipsos legitime procreatis seu procreantibus dis quibus forte deficien. veris legitimis et propinquieribus hæredibus dicti Archibaldi quibuscunque*."—Evidence, Royal Charter, Book ii. N. 90. 26th April, Anno Regni 20.—Certified Extracts of the above Charters are produced.

CAITHNESS.

8. The Peerage of *Caithness* was renewed in the Family of *Sinclair* some Time between the 1452 and 1476, as appears Two Charters: The First, dated the 8th July 1452, Book iv. N. 292. "*Dilecto consanguineo nostro Georgio de Crichton comiti de Caithness*," which shews that it was then in the Family of *Crichton*. And by another, dated the 7th Day

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go in the same Way that such Numbers of others have gone for so many Centuries.—The Words of the Judgment in the Case of *Cassils*, are: “ 27th June 1762, It was adjudged by the Lords Spiritual and Tem-

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December 1476, Book vii. N. 393. “ Dilecto consanguineo nostro Willielmo Sinclair filio dilecti consanguinei nostri Willielmi comitis Cathaniæ,” which proves it had extinguished in the Family of *Crichton*, and been revived in that of *Sinclair*. The most ancient, and indeed the only Charter which approaches near to the Period of the Creation of *Sinclair* Earl of *Caithness*, is the last of the Two foregoing Charters. It grants “ Omnes et singulas terras comitatus Cathaniæ Willielmo Sinclair filio dicti Willielmi comitis Cathaniæ et hæredibus ipsius Willielmi filii quibuscunque.”—Certified Extracts of the above Charters are produced.

LINDSAY of BYRES.

9. Sir *Robert Gordon* has not been able to ascertain the precise Date of the Creation of this Peerage; but the First Charter he discovers to Lord *Lindsay* is in the Year 1495. It contains a Grant of the Lands and Barony of *Byres* Joanni domino *Lindsay de Biris*. The Limitation of the Estate is “ hæredibus inter ipsos legitime procreatis seu procreandis quibus forte deficient. veris legitimis & propinquieribus hæredibus dicti Joannis domini *Lindsay* quibuscunque.”—Evidence, Royal Charter, Book xiii. N. 192. dated 8th November 1495. In 1497, the Investitures of the Family stand hæredibus suis.—Evidence, Charter, Book xiii. N. 287. dated 28th October, Anno Domini 1497. The Year following the Limitation of the Investitures is “ hæredibus inter ipsos legitime procreatis seu procreandis quibus deficient. legitimis et propinquieribus hæredibus dicti Joannis quibuscunque.”—Evidence, Royal Charter, Book xiii. N. 311. dated 14th June 1498. In 1504 there is an Investiture of Lands “ Patricio domino *Lindsay de Byris* et hæredibus suis.”—Evidence, Charter, Book xviii. N. 105. dated 8th August that Year. In 1508, there is a Charter, confirming Two Charters to *Patrick* Lord *Lindsay of Byres*, “ et hæredibus inter ipsos legitime procreatis seu procreandis quibus deficient. veris legitimis et propinquieribus dicti *Patricii* quibuscunque.”—Evidence, Royal Charter, Book xv. N. 19. dated 1st December 1508.—Certified Extracts of the above Charters are produced.

SEMPILL.

10. This Peerage was created some Time between the Year 1474 and 1505, as appears from Two Charters: The First dated in 1474, to *William Sempill*, Knight, “ filio et hæredi apparenti dilecti nostri *Roberti Sempill de Elliotstoun militis*,” when he is a Commoner: And by another in 1505, “ consanguineo nostro Joanni domino *Sempill*,” which shews the Peerage in the Family at this Time. In the First of those Charters the Estate of *Elliotstoun* and *Glasford* is limited “ filio *Roberti Sempill militis* hæredibus suis.”—Evidence, Royal Charter, Book vii. N. 306. 4th October 1474. In the Second Charter the Estates of *Elliotstoun* and *Glasford* are also limited “ Joanni domino *Sempill* et hæredibus suis.”—Evidence, Royal Charter, Book xiv. N. 157. 21st September 1505.—Certified Extracts of the above Charters are produced.

BORTHWICK.

11. This Peerage was created some Time betwixt the Year 1410 and 1458.—Evidence, Royal Charter, Roll xii. N. 7. *Willielmo de Borthwick militi*,” dated 4th June 1410, at this Time he is a Commoner. Royal Charter, “ consanguineo nostro Willielmo domino *Borthwick*,” dated 4th January 1458; at this Time he is a Peer. The Limitations in the Investitures immediately prior to the Creation are hæredibus suis.—Evidence, Charter, dated 4th June 1410, above quoted. In 1458, *William* Lord *Borthwick* takes a Grant of an Estate hæredibus suis.—Evidence, Royal Charter, Book v. N. 43. 14th January that Year. In 1483, the Investitures stand hæredibus et assignatis.—Evidence, Royal Charter, Book xi. N. 34. 7th February that Year.—Certified Extracts of the above Charters are produced.

LOVAT, Lord FRASER.

12. This Family were made Peers some Time betwixt the 1430 and 1480.—Evidence, Retour, Book iii. N. 94. in which *Hugh Frazer de Lovat* is returned by that Designation, 2d May 1430. Royal Charter, dated 23d February 1480, Book ix. N. 49. in which *Hugh* is designed, “ Hugo dominus *Frazer de Lovat*.” In 1432, the Limitation in the Investitures of this Family were hæredibus suis.—Evidence, Royal Charter, Book iii. N. 92. “ Hugoni *Frazer de Lovat*,” 14th September that Year. In 1480, the Investitures of the Family of *Lovat* are limited “ hæredibus suis et assignatis.”—Evidence, Royal Charter, Book ix. N. 33. of Apprising 31st August that Year. In 1501, One Estate of this Family stands hæredibus suis.—Evidence, Royal Charter, Book xiii. N. 474. 14th October that Year. And another Estate, the same Year, is limited hæredibus inter ipsos legitime procreatis seu procreandis quibus deficient. legitimis et propinquieribus hæredibus dicti *Thomæ* quibuscunque.” In 1509, the Investitures of the Family are hæredibus quibuscunque.—Evidence, Royal Charter, Book xiv. N. 73. 6th May that Year. On 1509, the Investitures of the Estate were limited hæredibus quibuscunque.—Evidence, Royal Charter, Book xv. N. 119. 6th May that Year. In 1510, the Limitation in the Investitures is “ hæredibus et assignatis suis.”—Evidence, Royal Charter, Book xvi. N. 23. 12th January that Year. In 1511, the Limitations in the Investitures of the Family are “ hæredibus suis et assignatis,” and “ hæredibus suis” simply.—Evidence, Charter, Book xviii. N. 23. 31st July 1511.—Royal Charter, Book xviii. N. 35. 29th January in the same Year. In 1527, the Limitation in the Investitures is “ hæredibus suis et assignatis.”—Evidence, Royal Charter, Book xxii. N. 74. 3d March that Year. In 1528, the Limitations of the Investitures is hæredibus suis.—Evidence, Charter, Book xxii. N. 272. 2d March that Year. In 1532, the Limitation in the Investitures is “ hæredibus suis et assignatis.”—Evidence, Royal Charter, Book xxiii. N. 5. 7th March that Year. In 1535, the same Limitation in the Investitures continues.—Evidence, Royal Charter, Book xxv. N. 187. 5th May that Year. In 1536, the Limitations of the Investitures is hæredibus quibuscunque.—Evidence, Royal Charter, Book xxv. N. 312. 18th July that Year.—Certified Extracts of the above Charters are produced.

HALIBURTON.

13. This Peerage was created some Time before the 1451. The first Charter found on Record to a Lord *Haliburton*, being in that Year.—Evidence, Royal Charter, Book iv. N. 140. 25th March the same Year. The Limitation in the Investitures of the Family Estate were “ hæredibus suis” at that Time.—Evidence, the foregoing Charter. The same Year 1451, the Limitation in the Investitures of the Family Estate is “ hæredibus inter ipsos legitime procreandis quibus forte deficientibus dicto Joanni et hæredibus legitimis et propinquieribus quibuscunque.”—Evidence, Royal Charter, Book iv. N. 141. 28th March that Year. On the 24th March, same Year, the Limitation in the Investitures is “ hæredibus suis.”—Evidence, Royal Charter, Book iv. N. 142. 24th March 1451. In 1474, the Investitures stand limited in the same Manner, “ hæredibus suis.”—Evidence, Charter, Book vii. N. 318. without Date, but which, from its Situation in the Record, must be about the 1474, the Charters immediately before it being dated in that Year, and the subsequent one in the 1475.—Certified Extracts of the above Charters produced.

HARRIS.

14. The Peerage of *Harris* was created some Time between the 1496 and 1493.—Evidence, Charter, Book x. N. 151. 1st June 1486, to *Andrew* the Son of *Herbert Harris de Terreagles*, who was then a Commoner. Charter, Book xiii. N. 77. dated 4th June 1493, “ *Herberto domino Harris*,” then a Peer. The Limitation of the Estate in the first of those Charters is “ hæredibus suis.” The Limitation in the Second “ hæredibus inter ipsos legitime procreatis seu procreandis quibus forte deficient. veris legitimis et propinquieribus hæredibus dicti *Herberti* quibuscunque.”—Certified Extracts of the above Charters produced.

poral in Parliament assembled, and declared, That Sir *Thomas Kennedy* had a Right and Title to the Dignity of Earl of *Cassils*, as *Heir Male*, descended of the Body of *David* the first Earl of *Cassils*, and also "had a Right and Title to the Dignity of Lord *Kennedy*, as *Heir Male*, descended of the Body of *Gilbert*, the first Lord *Kennedy*." Had the Peerage been adjudged to Sir *Thomas Kennedy*, because he was *Heir under the original Investitures of the Estate* about the Time of the Creation, and not because he was *Heir Male under the Peerage*; the Judgment would have described the former Quality, but not the latter; instead of which it describes Sir *Thomas* as possessed of the latter Quality, but omits the former (a).

Answer II.

ANSWER II.

If the Limitation of the Estate, at the Time of the Creation of this Peerage, directed that of the Peerage, the *Heir Female* would be excluded, because the Investitures of the Estate, which approach nearest to the Creation of the ancient Peerage, and those both before and after the Creation of *Adam Gordon*, were to *Heirs Male*. There is no Doubt of this down to the Year 1546, at which Period, to gratify his Wife, who, as observed, was a Lady of high Rank, *John* Earl of *Sutherland* altered the Limitations of his Estate from *heredibus suis* to *heredibus quibuscunque* (in the last Termination.)

The Investitures of the *Sutherland* Estate are to *Heirs Male* down to the Year 1455, at which Period it may be contended that the Term *heredes sui* meant, in Law Language, *Heirs General*; but that Charter was relative to former Investitures, which were to *Heirs Male*, and must therefore be interpreted by them. The Service of Earl *John*, the Grandson of him who passed this Charter, and the Brother of *Elizabeth*, does not contradict this; for Lady *Elizabeth* only says, he served himself *Heir*, that is to say, *Heir indiscriminately*, without assuming the Quality of *Heir Male*. There is nothing in the Circumstance that *Elizabeth Sutherland* took the Estate by a Service as *Heir General* to her Brother. That Service was plainly a cooked-up Affair, by her getting one *Heir* to name her his *Heir*, and another to renounce his Right to her, not to mention that she had the naming of the Jury in a Country where her Husband's Family were powerful, and would not, for her own Sake, lay the former Investitures of the Estate before them, which alone could explain the Intention of the Limitation *heredibus suis* in the Charter 1455.—The few Papers which, by the Graciousness of Lady *Elizabeth*, the Claimant can get a Sight of, create a strong Presumption that the Investitures prior to the Year 1455 were to *Heirs Male*, as they have been stated, which is fortified by the Presumption of Law, going in *dubio* for the *Heir Male*, especially in those early Times. If the ancient Investitures (a Thing very improbable in a Highland County) took in a nearer *Heir Female*, to the Prejudice of a remoter *Heir Male*, Lady *Elizabeth* has it in her Power to destroy both these Presumptions by Proof, viz. by producing the ancient Investitures; but this is not done, perhaps for the same Reason that the Instrument of Creation itself has been all along concealed, viz. that it would shew that this renewed Peerage was like the old one, descendible only to *Heirs Male*. It is indeed pretended, that the Family Papers are burnt: the common Excuse in *Scotland*, of those who are afraid to lay open their Charter Chests. There is no Proof that those Investitures, or this Instrument of Creation, were burnt.

Objection III.

OBJECTION III.

Peerages must anciently have descended in Course of Law to Females; for there are eleven Instances that in fact they did so.

Answer.

ANSWER.

There are four Qualities under some one of which these eleven Females must have had Right to their Peerages: Descent, Creation of the Husband, their own Creation, and special Limitation. Lady *Elizabeth* contends, That the first of these alone is to be presumed, and none of the rest; and the Instances she brings are beyond the Reach of Record, so that it is difficult to bring Proof on either Side: But the Note below (b) will shew how little she is entitled to suppose, that in all her Instances, the Lady assuming a Title, had a Right to a Peerage in her own Person by Descent. It is not enough for Lady *Elizabeth* to say,

PROOFS and AUTHORITIES.

(a) The Peerage was created in the Year 1509.—Evidence, Papers printed in the Precedency Process, p. 167. From Two Charters founded upon by the Lady *Elizabeth*, in the 1404 and 1405, that is to say, a Century before the Peerage was created, the Investitures during these two Years stood to *Heirs Male*; and from Four Charters founded upon by her, in the Year 1450, that is to say, Threescore Years before the Peerage was created, it appears, that Parts of the Estate were taken to *Heirs Male*. But in the 1489, the Investitures stood "*heredibus suis inter ipsos legitime procreatis seu procreandis quibus forte deficient legitimis et propinquieribus heredibus dicti Joannis domini Kennedy quibuscunque*."—Evidence, Royal Charter, Book xii. N. 122. 9th July that Year. In the same Year, the Office of the Bailliewick of *Garrick* is taken "*heredibus suis*."—Evidence, Royal Charter, Book xii. N. 123. dated 9th July. In 1501, the Lands and Barony of *Cassils*, and *Denuere cum castris*, were taken to *David Kennedy*, "*filio et heredi apparenti dilecto consanguinei nostri Joannis domini Kennedy et heredibus suis*."—Evidence, Royal Charter, Book xiii. N. 492. dated 17th February that Year. In 1505, the same Limitation in the Family Investitures continues.—Evidence, Royal Charter, Book xiv. N. 190. 12th February 1505.—In the Year 1506, the same Limitation in the Investitures continues.—Evidence, Royal Charter, Book xiv. N. 284. 31st March 1506. Royal Charter, Book xiv. N. 490. 28th January the same Year. In 1511, *David* Earl of *Cassils* takes a Grant of the "*castrum et manerium de Cassils*," to himself, "*et heredibus suis*."—Evidence, Royal Charter, Book xviii. N. 32. 5th February that Year. In 1536, the same Limitation of the Estate of *Cassils* continues.—Evidence, Royal Charter, Book xxv. N. 383. of the 20th of July that Year. And it was not until a Charter from *James V.* Anno 1540, founded upon by the Lady *Elizabeth*, that the Limitations of the Estate about Half a Century from the Time of the Creation of the Peerage.

(b) INSTANCE I. ANGUS.

The Lady *Elizabeth* maintains, That *Matildis*, who was Great Granddaughter to *Malcolm* Earl of *Angus*, was a Peeress in her own Person; for that she granted Deeds, in which she is styled *Matildis* Countess of *Angus*; and that Lord *Cook* says, she was succeeded by her Son *Gilbert*, "*who was Earl of Angus, as Heir to his Mother*."

ANSWER.

This Instance turns against the Lady *Elizabeth*; for it is acknowledged *Matildis* was twice married; first to *John Cumming*, and again to *Gilbert de Umphraville*, and that both her Husbands were Earls of *Angus*; so that the Peerage has plainly failed in her, for want of *Heirs Male*, before her first Marriage. But she took the Family Estate, as the Confirmation founded upon by Lady *Elizabeth* shews; and in Consideration of that, her Husband *John Cumming* was created Earl of *Angus*. That Marriage ended without Issue Male; and in Continuation of the same Favour to the Family, her second

say, That Women succeeded to Peerages; she must say further, that they enjoyed Peerages whereto they were not created nor entitled by special Limitation. But when the Claimant shews, that in a vast Number of Instances Women were excluded, because the Instrument or Evidence of Limitation was lost, he has a Right to say, that those who were admitted, were so from Creation or special Limitation; the *Exclusion* in the former

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second Husband *Gilbert de Umphraville* was created Earl of *Angus* also: Both of which Creations communicated the Title of Countess to her.—The Lady *Elizabeth* brings the Authority of Lord *Coke* to support her in this Precedent. But he appears to have been unacquainted with the Rules of Succession in ancient Earldoms in *Scotland*, and to have blended them with the Rules of Succession in a Barrony by Tenure or by Writ. He quotes no Authority to prove that *Gilbert* succeeded his Mother in the Peerage of *Angus*. Indeed the Succession of *Gilbert* to his *Scotch* Titles and Rights is not the Point under Consideration in this Passage. And it is much more probable, as will appear from the following Instances, that *Gilbert* got the Peerage by Descent from his Father than through his Mother.

Besides, the Lady has not proved that *Matildis* took by Descent in Prejudice of a remoter Heir Male; for, 1^{mo}, She may have been created Peeress herself: Or, 2^{do}, She may have been specially called in the Limitation, after the Heir Male of the same Degree, or after the Termination of all Heirs Male whatsoever.

INSTANCE II. ANGUS.

The Lady says, *Margaret* the eldest Daughter of *Thomas Stewart* Earl of *Angus*, possessed the Dignity.

It has been shewn Page 21. Note (i). That, upon the Death of *Thomas* without Heirs Male, the Peerage became extinct; that it was revived in the Person of her Husband *William Douglas*; and that, upon his Death, *George* the Son of that Marriage took the Peerage, even during the Life of his Mother.

INSTANCE III. CARRICK.

Martha Daughter of *Adam* Earl of *Carrick*, is said to have been Peeress upon the Authority of *Fordoun*, &c. and that her Son, King *Robert the Bruce*, took the Peerage in her Right.

ANSWER.

The Peerage must have been become extinct in her Person, through Want of Heirs Male, and been revived in the Person of her Husband *Robert Bruce*; for in a Paper in *Rymer*, called *Placita Parliamenti*, in the Year 1293, *Robert Bruce* the Father is called *Comes de Carrick*, *Rymer*, Vol. II. 614. In a Letter from *Edward I.* Anno 1294, to *Robert Bruce* the Son, *Robert* the Father still had the Peerage; for that Letter is directed to the Son, under these Words: *Roberto de Brus Domino de vale Anandi*, *Rymer*, Vol. II. p. 643. In a Warrant from *Edward I.* 1296, *Robert* the Father is stiled Earl of *Carrick*; for it is directed, “*Dilecto et fideli nostro Roberto de Brus comiti de Carrick*,” and it mentions *Robert* the Son as a Commoner; *Consimilem potestatem habet Robertus de Brus filius prædicti Roberti*. Yet even in the 1293, the Wife of *Robert* the Father was dead; for, in the first of these Papers, her Inheritance “*totum comitatum de Carrick cum pertinentiis suis et etiam omnes alias terras quas in Scotia aliquo tempore tenuimus*,” is mentioned as having gone to her Son, as belonging to him, “*ratione Margaretæ quondam comitissæ de Carrick*,” afterwards *Robert* the Son was Earl of *Carrick* upon his Father's Death, which shews plainly, that he took the Peerage through his Father, and not through his Mother.

Fordoun means nothing by *Comitatus*, but the Land Estate: And the Resignation by *Robert* the Father, of the *Comitatus*, to his Son, means nothing but a Resignation of the Estate, seeing that, notwithstanding that Resignation, he still continued to possess the Peerage.

INSTANCE IV. MARR.

Margaret, Wife of *William* Earl of *Douglas*, was Countess of *Marr* in her own Right.

ANSWER.

This is an unlucky Instance. It was made clear as the Light, in the Condescendence given in, in the Competition for the Peerage of *Lovat*, That her Husband the Earl of *Douglas* was the Peer, and not she: For after his Death, his Son was designed “*Comes de Douglas et de Marr*” in several Charters, although his Mother *Margaret* was then alive. Vide Answers, 14th July 1729, to Mr. *Mackenzie's* Condescendence in the *Lovat* Papers, p. 16.

INSTANCE V. MARR.

The Earldom of *Marr* went to *Isobell*, the Daughter of the said *Margaret* and *William*, who married *Alexander Stewart* Son to the Earl of *Buchan*.

ANSWER.

It is true, that *Isobell*, the Daughter of *William* Earl of *Douglas* and *Marr*, is, in a private Charter, dated in 1404, designed “*Isobella comitissæ de Marr*,” but it appears by the same Charter, that she was then in her Widowity. Lady *Elizabeth* produces no Evidence to prove that this Lady was a Countess in her own Right; and it is much more probable, if she truly had Right to that Title, that it was as the Wife of a former Husband, who had been created Earl of *Marr*, on the Failure of Heirs Male of Earl *William* and Countess *Margaret*.—Evidence, Book vii. N. 257. Charter, 12th August 1404.—Certified Extract produced.—That this Peerage must have failed with the Heirs Male of *William* Earl of *Douglas*, and his Wife the Heiress of the Estate of *Marr*, will be made clear by the Instance immediately following.

INSTANCE VI. MARR.

Lady *Elizabeth* states, That *John* Lord *Erskine* derived Right to the Peerage of *Marr*, from *Helen* Daughter of *Gratney* Earl of *Marr*, and that he was restored to the Peerage, which had been illegally withheld from him and his Ancestors by the Crown, by Act of Parliament in 1587, “*per modum justitiæ*.”

ANSWER.

It has been shewn in a former Instance, that the ancient Peerage of *Marr* failed with the Male Line of *Gratney* Earl of *Marr*, and that *William* Earl of *Douglas*, who married *Margaret*, Daughter and sole Heir of *Thomas* Earl of *Marr*, the last of that Race, got the Peerage renewed to him, and the Heirs Male of the Marriage. Those Heirs having failed, this Peerage was again renewed (as has also been shewn) in the Person of *Alexander Stewart*, Son of the Earl of *Buchan*, the Husband of *Isobell Douglas*, Heir of Line of *William* Earl of *Douglas* and *Marr*. *Alexander* Earl of *Marr* died without Heirs Male, as appears by a Charter dated in the 1565, which has the following Words in relation to him and his Wife *Isobell Douglas*: “*Et quod postea dicti Alexander et Isobella absque legitimis hæredibus inter ipsos procreatis abierunt*.” This Charter joined to the Act of Parliament 1587, affords clear Evidence, that the Peerage of *Marr* had extinguished upon the Death of *Alexander Stewart* Earl of *Marr*, without Issue Male of the Marriage betwixt him and *Isobell Douglas*; for those Deeds prove, that the Lords *Erskine* were the Heirs of Line of *Gratney* Earl of *Marr*, who must therefore have succeeded to this Peerage, upon the Death of *Isobell* Countess of *Marr*, if they had had Right to the Peerage; but instead of this, the Deeds prove that the Family of *Erskine* continued only in the Rank of Lord Barons. *John* Lord *Erskine* is not named

mer Instances founding a Presumption, that the *Admission* in the latter arose from one or other of those Means. And Lady *Elizabeth* must, in this Competition between her and the Claimant, not only prove that Females were admitted, though to Peerages of which the Limitations were not known, but that they were so in Preference to remoter Heirs Male; for although the Law were, that Females should succeed to Peerages,

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named Earl of *Marr* in the Charter 1565, neither does that Charter convey the Peerage to him. It is only a Charter of Lands, as appears by the granting Words, "*Damus et concedimus dicto nostro consanguineo Joanni domino Erskine suis hæredibus et assignatis hæreditarie totum et integrum dict. comitatum de Marr continen. terras subsequentes.*" And it is this Grant of the Estate, and not the Peerage, which is ratified by the Act of Parliament 1587. Soon afterwards, indeed, Lord *Erskine* is entitled Earl of *Marr* in Grants from the Crown, but this must have been in consequence of a new Creation by Queen *Mary*, by whose Indulgence he had got the Estate.—Evidence, a Royal Charter, 20th June 1565, Book xxxii. N. 501. Act of Parliament 29th July 1587. Records of Parliament that Year.

INSTANCE VII. STRATHERN.

• *Euphemia* succeeded *David* Earl of *Strathern*, and was styled Countess of *Strathern*; and her Son *Malise* was Earl.

ANSWER.

The History of the Peerage of *Strathern* has been given Page 20. Note (i). from which it appears, that *Euphemia* never was Countess of *Strathern* in her own Right, and that she had not even a Title to the Land Estate, although she usurped it.

INSTANCE VIII. ROSS.

Euphame Ross, Daughter of *William* Earl of *Ross*, was Countess of *Ross*.

ANSWER.

The Charter referred to by Lady *Elizabeth*, which is dated the 23d of October 1370, is a Conveyance only of the Land Estate.

But, notwithstanding *Walter Lesly* and *Euphemia Ross*, by virtue of the Substitution in this Charter, upon Earl *William*'s Death without Issue Male of his Body, had the Earldom, (i. e. the Estate) yet they had not the Peerage. *Walter Lesly* is mentioned in several Papers in *Rymer's Fœdera*, downwards from the 1374. In the first of them, in that Year (his Father-in-law the Earl of *Ross* being then alive) he is described by the Name of *Miles* or Knight. In the second, in 1375, the Earl of *Ross* being then dead, and *Walter* having succeeded to the Estate of *Ross*, he is designed *Dominus de Ross* (i. e. Laird or Proprietor of the Estate of *Ross*). And in the third, which is dated in 1379, having been created Earl of *Ross*, he is named *Comes de Ross*; so that his Wife came properly to be called Countess of *Ross*, as being Wife of an Earl.—Evidence, *Rymer* Tom. vii. p. 45. Safe Conduct, by *Edward III.* Anno 1374, in which are these Words: "*Walterus de Lesley miles de Scotia.*" *Rymer*, Tom. vii. p. 53. Safe Conduct, by *Edward III.* Anno 1374, which has these Words: "*Walterus de Lesley miles dominus de Ross.*" Tom. vii. p. 215. Safe Conduct, by *Edward III.* 1379, granted "*in dominum Walterum Lesley comitem de Ross.*" The different Designations of the same Man in these Papers clearly point out the Change of his Situation at the different Periods of Time.

The Lady *Elizabeth* says, That *Euphemia*'s second Husband, the Earl of *Buchan*, was called *dominus Ross*. But she quotes the Sentence of the Bishop erroneously: For in the Sentence he is designed *dominus de Ross*, for a very good Reason, because having the Family Estate in her Right, he was Laird of *Ross*.

INSTANCE IX. BUCHAN.

Margaret, the Daughter of *Fergus*, Earl of *Buchan*, is designed in a Deed Countess of *Buchan*, and her Husband, Sir *William Cuming*, (in an old Chronicle) Earl of *Buchan*.

ANSWER.

Supposing she had been Wife of *William Cuming*, of which there is no Evidence, she may have been Countess in consequence of Sir *William Cuming*'s Creation, upon the Extinction of the Peerage in her Person; for the Deed says, "*in legitima potestate viduitatis meæ;*" or she may have been created Peers herself, to renew the extinct Peerage; or she may have been called specially as an Heir Female in the Limitations of the Peerage. This Instance, like most of the others of Lady *Elizabeth* upon this Head, is beyond the Time of Record, so that it becomes impossible for Sir *Robert Gordon* to point out the particular Quality under which she took the Peerage.

INSTANCES X and XI. BUCHAN.

These two Instances run into one another, and therefore shall be answered together. *John*, Earl of *Buchan*, had two Sons, *John* and *James*; *John*, the eldest, had a Daughter *Christian*, to whom the Family Estate went.—Evidence, Charter, Book xxx. N. 139. 4th of August 1547, of the Estate of *Buchan*, to *John*, apparent Heir of *John* Earl of *Buchan* "*Tenend. & habend. &c. præfat. Joanni Stewart suis hæredibus et assignatis quibuscunque &c.*" It does not appear that *James* took the Peerage; though whether on Account of his not having the Family Estate he was indifferent about it, or upon what other Account, cannot at this Distance of Time be known. *Christian* assumed the Title for some Time, and her Husband continued a Commoner.—Evidence, Precept of Apprising from the Privy Seal, Book xxxii. Fol. 44. dated 20th December 1563, "*Que fuerunt Christine comitisse de Buchan & magistri Roberti Douglas ejus conjugis pro suo interesse.*" But afterwards, to secure the Peerage, her Husband, who was Nephew to the Regent *Murray*, got a Creation from his Uncle.—Evidence, Record of Charters, Book xxxiv. N. 123. of Date 7th April 1574, quoted by the Lady *Elizabeth*, P. xiii. Note C. of her Case, in which he is designed Earl of *Buchan*. Afterwards *Robert Douglas* sat in Parliament as Earl of *Buchan*.—Evidence, *Anderson's Historical Collections*, Vol. ii. P. 228. in Quarto, in which he gives the Roll of Parliament in December 1567, wherein the Earl of *Buchan* is present. This Record was carried from Scotland to England, and was in the Cotton Library.—Evidence, 2d Roll of Parliament, 10th November 1579, in which the Earl of *Buchan* is marked sitting.—Certified Extract of the Roll produced. This Creation of the Husband shews, that *Christian* could not be Countess in her own Right. The Peerage became extinct by the Failure of Heirs Male of the Marriage betwixt *Christian* and *Robert Douglas*; they had a Granddaughter, *Mary*. This *Mary* was anxious, as she had the Family Estate, to get also the Peerage; with this View she assumed the Title, hoping thereby to make it be believed that she got the Peerage by Female Descent from her Grandmother *Christian*. Her Husband, *James Erskine*, the Lord Treasurer's Son, was created Earl of *Buchan*, by a Charter, 22d March 1617, to him and his Heirs Male by the Heiress of *Buchan*; but being conscious of the Right of the Heir Male of *John* Earl of *Buchan* before-mentioned, and afraid lest he should make Claim to the ancient Peerage, they procured a Revival of that Peerage with the Concurrence of the Heir Male, thereby validating their Right.—Evidence, 1mo, Charter, Book xlvi. N. 390. 22d March 1617. 2do, Royal Charter, Book N. 80. 25th November 1625. As a Proof that the Peerage was in *Mary*, Lady *Elizabeth* says, she was served Heir to her Grandmother *Christian*; but that can be no Evidence that the Title was in *Christian*, for she was also, and at the same Time, served Heir to *John* Master of *Buchan*, *proavo suo*, *John* Earl of *Buchan*, *abavo suo*, and to *James* Earl of *Buchan*, *tritavo suo*; the only Conclusion therefore to be drawn from these Services is, that *Christian* was Heir to those Persons.—Evidence, certified Extracts of the Record of Retours in Chancery, Book ix. Fol. 301.

upon Failure of all the Heirs Male, it will only bring her in when all the Heirs Male are extinct; not now, when one of them, whose Propinquity is undisputed, is claiming against her.

OBJECTION IV.

Women have, in sundry Instances, been directly named and substituted in the Grants of Jurisdictions, and of Offices.

ANSWER.

As to the first Instance, *viz.* That of the Constabulary of Scotland to Gilbert Hay, *et hæredibus suis*, for which a Charter in the Reign of Robert I. is appealed to, in the Year 1315, the Terms *hæredibus suis* in that Charter must have meant Heirs Male, the Heirs in the former Investitures; for there is a Royal Charter, dated (c) 1541, which proves that in all Time past the Constabulary of Scotland had been limited to Heirs Male, and orders it to go to Heirs Male in all Time to come. With regard to the Offices of Sheriffship and Mair of Fee there is nothing incongruous in their being held by Women, because a Woman could execute them by Deputy, but a Peer cannot act by Deputy.

OBJECTION V.

The Number of Resignations which let in Heirs Female, were not made for that Purpose, as they would have come in without them, but to bring in a new Line of Heirs, both Male and Female; and for this four of the Resignations are referred to, *viz.* Kilmarnock, Rothies, Errol, and Kinghorn.

ANSWER.

If Lady Elizabeth's Argument that Peerages are territorial, and that the Peerage followed, what she calls the dignified Fief, *i. e.* the Land Estate, was good, there would have been no need of Resignations for letting in a new Line of Heirs; for the very Settlement of the Estate would have fixed the Descent of the Peerage. But the Claimant does not found his Argument upon four Instances; he might have founded it upon forty: Yet Lady Elizabeth is mistaken even in the four Instances she selects; for all these four Peerages went to Males; and unless there had been a Resignation, Females must have been excluded (d). In the Resignations of Errol, Rothies, and Kilmarnock, the first Substitutes, after the Issue Male of the Grantee's Body, are his Daughters; and it matters not, that after them there were Limitations over, for this happens in every Settlement of Land Estates. It is enough for the Claimant to prove, that without these Resignations the Peerages must either have gone to remoter Heirs Male, or extinguish, as the Resignations alone opened the Door to Females. The new Creation (in the Note below) of the Peerage of Napier, upon the Resignation of Lord Napier, expressly bears, that it was granted to Heirs General because, without the Resignation, it must have gone to Heirs Male (e).

OBJECTION VI.

Adam Gordon assumed the Title of the Earl of Sutherland by Courtesy only, in Right of his Wife, which was customary in Scotland, and seventeen Instances are pointed out; and what makes this more probable is, a Charter, 1st December 1527, to Alexander Gordon, Son of Adam and Elizabeth, in which the Liferent is reserved in these Words: "Dictis Elizabeth comitisse de Sutherland & Adæ Gordon sponsæ suæ ratione curialitatis Scotiæ, et eorum alteri diutius viventi, pro toto tempore vitæ suæ."

ANSWER.

There is not one Law Book, from the first extant to this Day, that says, a Husband became a Peer by Courtesy in Right of his Wife. The Supposition involves this Absurdity, either that the Husband, upon his Wife's Death, must, during his Life, exclude her Son from the Peerage, or the Husband and Son must enjoy the same Dignity at one Time. The Instances brought destroy the Possibility of the Rule; for Courtesy takes not place until after the Wife's Death; whereas, in the pretended Precedents, the Husband enjoyed the Peerage during her Life. Earl Adam did so; therefore he could not take by Courtesy. There are indeed sundry Instances of Titles of Honour enjoyed by the Husbands of Peereffes; but they decide not whether the Husband's Right was by Courtesy or Creation; on the other Hand, there are sundry Instances both ancient

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(c) "Quia nos perpenden. non minus virtutis ex præfato Georgio quam suis predecessoribus procedere apparen. volen. dictas terras et baroniam de Slains terras de Innerpeffer officium magnæ constabulariæ Scotiæ et jus patronatus prædict. cum hæredibus masculis cognominis de Hay in omnibus temporibus futuris remanere prout fuerunt in temporibus elapsis." Certified Extract produced, dated 13th December 1541, Book xxviii. N. 205.

(d) 1mo, Charter of Resignation of the Estate and Title of Errol; dated at Whitehall, 13th November 1666. Record of Charters in Chancery, Book iii. Fol. 78.—Certified Extract produced. 2do, Charter of Resignation of the Title of Honour of Earl of Rothies; dated at Whitehall, the 4th of July 1663; Book lviii. N. 312. Record of Charters.—Certified Extract produced. 3tio, Patent to William Lord Boyd, creating him Earl of Kilmarnock *et hæredibus masculis*, 17th August 1661, Book lviii. N. 16.—Certified Extract produced. Charter of Resignation of the Title of Earl of Kilmarnock; dated at Kensington, the 22d January 1707. Record of Charters in Chancery, Book xxiii. Fol. 125.—Certified Extract produced. 4to, Patent to the Earl of Strathmore, narrating a former Patent to Patrick Earl of Kinghorn, and the Heirs Male of his Body; dated at Whitehall, the 1st July 1677. Record of Charters in Chancery, Book vii. Fol. 86. Charter of Resignation of the Title of Earl of Kinghorn; dated at Whitehall, 30th May 1672. Record of Charters in Chancery, Book v. Fol. 6. 5to, Patent to Archibald, Lord Napier; dated 7th February 1677. Records of Chancery, Book ix. Fol. 38.—Certified Extract produced.

(e) Carolus Sciatis, &c. Et quod etiam si per honoris diploma ab augustissimo nostro patre beatæ memoriæ de data quartæ die mensis Maij anno Dom. 1627. concessum per ad dict. primo dominum Naper de Merehilton prædict. titulus et dignitas sibi suis que hæredibus masculis successive solummodo providetur. Nos nihilominus ob causas prædict. firmiter determinati pro regni nostra benignitate et respectu erga prædictam familiam, prædict. honorem titulum et dignitatem perpetuare ut in et cum eadem remaneat in persona prædicti domini Napier ejusque hæredum talliæ et provisionis quibus hæredes masculi de suo corpore deficerent et ad hunc effectum ejus resignationem prædict. tituli in favorem sui ipsius ejusque hæredum quorumcunque recepimus: ideoque nos, &c. damus concedemus et disponimus, &c. Archibaldo domino Naper ejusque hæredibus masculis ex suo corpore quibus deficiant hæredi famillæ natu maxime ex suo corpore, &c. prædict. honorem titulum dignitatem et præcedentiam domini et dominæ Naper. Records in Chancery, Book ix. Folio 38. A certified Copy is produced.

and modern, where the Title of Honour was not enjoyed by the Husband of the Peerefs; and these decide that Peerages are not acquirable by Marriage to the Husband, for if the Dignity was transferred to the Husband by Courtesy, it must have been universally so. There are also various Instances of Husbands being created Peers after the Marriage, either by the same, or a different Title. Mr. *Falconer*, after his Marriage with the Countess of *Errol*, remained a Commoner; so did Sir *Alexander Anstruther*, after his Marriage with Lady *Newark*; Sir *William Scott*, after his Marriage with Lady *Napier*; and, in later Times, Colonel *William Dalrymple*, after his Marriage with the Countess of *Dumfries*. *Walter Scott*, marrying the Countess of *Buccleugh*, was created Earl of *Tarras* for Life; Sir *James Wemyss*, marrying the Countess of *Wemyss*, was created Lord *Burntisland*, but not Earl of *Wemyss*; the Earl of *Selkirk*, marrying the Dutchess of *Hamilton*, was created Duke of *Hamilton* for Life. This last is a very remarkable Instance; for had he upon his Marriage, *ipso facto*, become Duke of *Hamilton* for Life, he needed not, nor would have desired a Grant of that Honour from the Crown. There are no doubt many Instances of the Husbands of Heiresses of Families that had enjoyed Peerages, being Peers; but this was owing to two Causes: First, the great Connection between *France* and *Scotland*, which led the *Scotch* to imitate the *French* Customs; (d) and it was usual in that Kingdom, when a Dignity ended by the Failure of Heirs Male, for the Crown to renew it by Creation in the Husband of the Female Representative of the Family, who enjoyed the Estate. The other, that in *Scotland* the King having the Ward and Marriage of the Heiress, always gave her in Marriage to a Person whom he thought worthy of having the Peerage conferred upon him. These two Causes sufficiently account for the Instances adduced by Lady *Elizabeth* (e).

It

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(d) One out of many Instances in *France*, shall be given from President *Hainault* with regard to the Peerage of *Rohan*. 1649. "Marguerite de Rohan fille de Henri Duc de Rohan. don't le Duche créé en 1603, avoit éteint par sa mort en 1638 faute d'heirs males conformément, a la clause apposée dans les lettres, obtint du Roi de nouvelles lettres pour son mari Henri de Chabot et elle et pour leur descendens males."

(e) INSTANCE I. and II.

Matilda Countess of *Angus*'s two Husbands, *John Cumming* and *Gilbert de Umphraville*, were both Earls of *Angus*. The Instance is beyond the Date of the Records of *Scotland*: and it is difficult at the Distance of five hundred Years, to account how these two Husband's acquired the Peerage. In Page 30. Note (b). the great Probability was shown, that upon the Failure of the Peerage in the Person of *Matilda*, and the Transmission of the Estate to her, that her Husband *John Cumming*, was created Earl of *Angus*, a Thing exceedingly common in *Scotland* when the Peerage sunk in a Female. But that the Family Estate went to her; and that upon the Failure of issue Male of the Marriage, her second Husband *Gilbert de Umphraville* was also created. If the Lady's Position was true; this Absurdity would follow, that there might have been two Earls of *Angus* at the same Time. The one her Son, and the other her second Husband.

INSTANCE III.

Sir *David de Hastings*, was Earl of *Athole* in Right of his Wife *Fernelith* Countess of *Athole*, for which the Lady quotes *Fordoun*, *Lord Ochiltree*, and *Rymer*.

ANSWER.

Fordoun uses these Words, "David de Hastings ejus accepit comitatum provenientem sibi ex parte Uxoris suæ." Lord *Ochiltree* repeats the same Thing after him. *David de Hastings* is not to be found in the Page of *Rymer*, quoted by Lady *Elizabeth*; but there is a Deed in *Rymer*, which it is supposed the Lady *Elizabeth* refers to, and that Deed only Names *David de Hastings* comes, without mentioning that it was in Right of his Wife. The Passage from *Fordoun* only shows, that *David de Hastings* got the Comitatus, that is to say, the Land Estate through his Wife. In Consequence of which the Crown has, (as it did in fifty other Instances,) conferred the Peerage upon the Husband.

INSTANCE IV.

John de Strathbogie married *Ada* Daughter of the last mentioned Earl of *Athole* and *Fernelith*, whereby the said *John* became Earl of *Athole*.

ANSWER.

The Authorities quoted are *Rymer* and Lord *Ochiltree*. The Authorities from *Rymer* only show, that there was such a Person at the End of the 13th Century, as *John* Earl of *Athole*, but do not say who he married, or how he became Earl. Lord *Ochiltree* is only a late Authority; but supposing *John* had been the Husband of *Ada*, his Creation is to be accounted for in the same Way with the three former Instances. His Creation is the more probable too, because he was Nephew of the Great House of the Earls of *Fife*, vide *Lovat Papers*. Answers. July 14th 1729. p. 5th.

INSTANCE V.

Malise Earl of *Stratherne*, married *Maulda* only Daughter and Heir of *Magnus* Earl of *Orkney* and *Caithness*. In her Right he was Earl of *Orkney* and *Caithness*.

ANSWER.

It was shewn in the *Lovat Papers*, Answers to Mr. *Mackenzie's* Condescendances, p. 23, 14 July 1729, That there was not the least Vestige that *Malise* was ever Earl of *Orkney*, or that his Daughters had any Dignity in Right of Blood. That *Torpheus*, the Danish Historian, showed Sir *Henry Sinclair* was created Earl of *Orkney* by the King of *Norway* in 1579; and that therefore the Rules of Law with regard to a Danish Peerage, could not regulate a Scotch one.

INSTANCE VI.

Robert Stewart second Son of King *Robert II.* married *Margaret*, Heiress of the Earldome of *Monteith*; and thereupon bore the Title of Earl of *Monteith*.

ANSWER.

The Authority quoted is that of Sir *James Dalrymple*, which makes directly against the Lady *Elizabeth*, The Words are, page 393. "It seems by Marriage with Earl *Murdach's* Daughter, the Earldom came to *Robert Stuart*, second Son to King *Robert*, who was designed *Custos Comitatus* before he was designed *Comes de Monteith*, and afterwards of *Fife* and Duke of *Albany*." The Passage proves two Things: first, That after the Husband had got the Earldome, (that is the land Estate) he was called only *Custos Comitatus*: and 2dly, That he was not till afterwards designed *Comes de Monteith*; which must have been upon his Creation.

Under this Instance, the Lady *Elizabeth* mentions the Case of the Earldome of *Fife* resigned by *Isobell* to this *Robert Stewart*. This has nothing to do with Courtesy, for *Robert Stewart* was not *Isobell's* Husband, and upon the Lady's own Account of the Matter, he got the Peerage not by Courtesy, but by Resignation. The Authorities are improperly quoted in

It has been shewn, that *Elizabeth Sutherland*, Earl Adam's Wife, was not Countess by Creation, and could not be so by Descent. The Charter 1st December 1527, does not prove that Earl Adam was Earl by Courtesy :
For

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in Lady *Elizabeth Case*, 1769. For *Fordoun* and *Rymer* are quoted as mentioning *Robert Bruce*, to be *Comes de Carrick ex parte Uxoris*. Whereas *Fordoun* only says so; but *Rymer* calls him simply *Comes*.

But there is a separate Answer to this Case of *Fife*: for it has been shown, Page 24. Note (q) of this Case, That *Isobell of Fife* in the 1365, was not a Peeress; and Lady *Elizabeth* has not been able to show, that she got a Grant of the Peerage after that Period. This Lady, at the Time she resigned the Earldome, (i. e. the Land Estate) appears to have been in Widowity. And in the Deeds referred to, Mention is made of her former Husband *Walter Stuart*, who has therein no Title of Dignity ascribed to him. The Probability therefore is, that this Lady was not Peeress in her own Right, but had the Designation of Countess of *Fife*, as the Widow of some Person, who had got a Creation of that Dignity, which *Bisset* might have got some Time after the 1366; as he is said to have been Earl in Lord *Ochiltree's* Collections, an Authority frequently quoted by Lady *Elizabeth*; *Isobell* therefore, having no Right to the Peerage herself, could not communicate it to her Husband. Evidence, Lord *Ochiltree's* Collections Advocates Library, A. 7. 24.

INSTANCE VII.

Robert Bruce married *Martha* Countess of *Carrick*, and in her Right became Earl of *Carrick*.

ANSWER.

It has been shown Page 31. Note (b). That the Peerage of *Carrick* was transmitted to *Robert Bruce* the Son, through his Father and not through his Mother: for he was not a Peer, until many Years after his Mother's Death, which he must have been, if his Father had been only Peer by Courtesy; for the Peerage by Courtesy to the Husband could not strip the Peeress's Son of his Right, and the Earldome (i. e. the Estate) in 1293, was in *Robert* the Father's Person, which upon the Lady's own Principle, made him Earl in his own Right.

INSTANCE VIII.

Walter Lesly married *Euphemia*, the Daughter of the Earl of *Ross* in whose Right he became Earl of *Ross*.

ANSWER.

It has been shown, Page 32. Note (b). that although the Earldome, (i. e. the Land Estate) was in *Euphemia*, and her Husband, upon the Death of the last Earl; yet the Peerage was not in him till long after, which shews he must have taken it by Creation and not by Courtesy.

INSTANCE IX.

William, Earl of *Douglas*, married *Margaret*, Countess of *Marr*. Under the Stile of Earl of *Douglas*, he is named in many Royal Charters.

ANSWER.

It was shewn, That *Margaret's* Husband, the Earl of *Douglas*, was the Peer, and not she: For after his Death, his Son was designed Earl of *Douglas* and *Marr*; although his Mother *Margaret* was then alive.

INSTANCE X.

Alexander Stewart married *Isobel*, Countess of *Marr*, and in her Right was Earl of *Marr*.

ANSWER.

On the 12th August 1404, *Isobel*, Countess of *Marr*, conveyed the *Comitatus* of *Marr*, "Totum et integrum comitatum nostrum de Mar," to *Alexander Stewart*, in Contemplation of the Marriage, "et hæredibus suis inter ipsum et nos procreandis quibus forte deficient. veris et legitimis hæredibus vel assignatis prædicti Alexandri quibuscunque."—Evidence, Charter, 12th August 1404, Book vii. N. 257. In the 1426, the fore said *Alexander Stewart* was so completely vested in the Property of the *Comitatus*, i. e. the Estate, that he resigned it into the King's Hands, and took a new Grant to himself and his Natural Son, *Thomas Stewart*.—Evidence, Royal Charter, Book ii. N. 8. 28th May that Year. Now, upon the Lady *Elizabeth's* Principle, the Conveyance of the *Comitatus* to *Alexander* should have conveyed the Peerage to him, so as to make him take it by Deed and not by Courtesy.

INSTANCE XI.

Patrick Graham married *Euphemia*, Countess of *Stratherne*. After his Marriage he was stiled Earl of *Stratherne*, in Right of his Wife.

ANSWER.

It has been shewn, Page 20. Note (i). That *Patrick Graham* was created Earl of *Stratherne* by the Duke of *Albany*, Regent of *Scotland*, Uncle to his Wife; because, by the Partiality of the Duke of *Albany* to her, the Family Estate had gone to her, which ought to have gone to the Crown.

INSTANCE XII.

Walter Stewart, Earl of *Athol*, Son of *Robert II.* married the Daughter of Lord *Brechin*; and in her Right assumed the Title of *Dominus de Brechin*.

ANSWER.

The Distinction betwixt a Lord and what in *Scotland* is called a Laird, that is to say, a Proprietor of Land Property, without a Peerage, is marked by the Particle *de*. *Dominus Brechin*, would signify, Lord *Brechin*; but, *Dominus de Brechin*, signifies, Laird of *Brechin*; of which Numbers of Instances have occurred in the Notes in this Case: Vide, also, Lord *Kaims's* Essays; Title, Honour, Dignity. "The Barons by Creation, called Lords of Parliament, were distinguished in common Language from the Barons by Tenure, by being called Lords, such as, Lord *Erskine*, Lord *Borthwick*, Lord *Seaton*, &c.; whereas, Barons by Tenure were called Lairds; for Example, the Laird of *Dundaff*, the Laird of *Calder*, the Laird of *Luss*, &c. Because there is no Latin Word for a Laird, the Barons by Tenure were called *Domini*, as well as the Lords of Parliament were: But then, to express the Difference, the following Forms were constantly observed. If a Laird or Baron by Tenure was meant to be expressed, it was in this Manner, *Dominus de Calder*, *Dominus de Balwirie*, *Dominus de Luss*, &c.: But Lords of Parliament were expressed by leaving out the Article, thus, *Dominus Erskine*, *Dominus Seaton*, *Dominus Borthwick*." And his Lordship, for Proof of this, annexes a Copy of the Roll of Parliament 1471. It was shewn in the *Lovat Papers*, Memorial, July 8th 1729, Page 27th, That there was no Peerage of *Brechin* until the Time of *Charles I.*

INSTANCE

For though it reserves the Liferent to *Elizabeth* and *Adam*, "*Ratione curialitatis Scotiae*," and to the longest Liver of them Two, it relates only to the Lands, not to the Peerage; and means no more than that *Adam* should have the Liferent of the Lands during his Wife's Life, *jure mariti*, and after her Death by the Courtesy, which was the common Law of the Land.

OBJECTION VII.

Objection vii. *Adam Gordon* could not be created a Peer by the Duke of *Albany*, because Regents had no Power to create Peers, they being named only for common Administration of the Kingdom. A Regent could not give away Lands from the Crown, and therefore could not create a Peerage.

ANSWER.

Answer. There are a Variety of Creations by Regents in *Scotland*; (f) and indeed it was inherent in the Administration

PROOFS and AUTHORITIES.

INSTANCE XIII.

Sir *William Cummin*, *Dominus de Tindail*, married *Margaret*, Countess of *Buchan*; after which, he bore the Title of *Comes Buchaniae*.

This Peerage is above Five Hundred Years old. All Record of it is lost. The Lady *Elizabeth* says, Sir *William Cumming* married the Countess of *Buchan*, but she brings no Evidence of it. All the Evidence she appeals to, is a Deed from *Rymer*, in which *William Cumming* is called *Comes de Buchan*: But there is no Proof how he came by that Peerage.

INSTANCE XIV. and XV.

Robert Douglas, of *Locheven*, married *Christian*, Countess of *Buchan*; and thereupon assumed the Title of Earl of *Buchan*. And *James Erskine*, Son to the Earl of *Marr*, married *Mary Douglas*, Countess of *Buchan*; and thereupon assumed the Title of Earl of *Buchan*.

ANSWER.

It has been shewn, Page 32. Note (b). That *Robert Douglas* got a Creation; and that *James Erskine* also got a Creation, to which the Consent of the Heir Male in the Peerage was taken; and the History of the Peerage in the same Note shews that it could not descend to a Female.

(f) CATHCART.

Sir *Allan Cathcart* was created Lord *Cathcart* 1442.—Evidence, *Nisbet*, Vol. I. p. 246.

CRICHTON.

William Crichton was a Commoner on the 27th April 1442.—Evidence, Charter, Book iii. N. 171. of that Date, by *James II.* *Willielmo Crichton de eodem militi*; but he was created a Peer before 7th April 1450.—Evidence, Charter, Book iv. N. 15. of that Date, by *James II.* "*Willielmo domino Crichton nostro cancellario*."—*Abbreviatio Scoti chronicon*, printed with *Fordoun*, Vol. ii. P. 542.

ABERNETHY of SALTOUN.

Laurence Abernethy, of *Saltoun*, was created Lord *Abernethy* of *Saltoun*, by *James II.* Anno 1445. *Fordoun*, P. 542.

MONEYPENNY Lord MONEYPENNY.

This Peerage was created about the 1450.—Evidence, *Crawford's Peerage*, Page 345.

GORDON Earl of HUNTLY.

Alexander Seaton of *Tillibothy* was a Commoner in 1440.—Evidence, Charter, Roll xi. N. 33. 20th July, 1408, by the Duke of *Albany*, "*Alexandro de Seaton filio Willielmi de Seaton militis et Elizabeth de Gordon filiae et heredi quond. Adm. de Gordon militis*."—Charter, quoted in Lady *Elizabeth's Case*, 1769, P. 13. dated 13th May 1440, wherein *Alexander* is designed "*Alexandro de Seaton de Tullibody filii et heredis Elizabeth de Gordon de eodem*. Book iii. N. 176. Certified Extracts produced. But betwixt this Period and the 1449 he was created Earl of *Huntly*.—Evidence, Charter, Book iv. N. 106. from King *James II.* to the same Person therein designed "*dilecto consanguinio nostro Alexandro comiti de Huntly*."

BUCHAN.

James Stewart, Brother to King *James II.* was a Commoner on the 1st March 1466.—Evidence, Charter, Book vi. N. 114. by *James III.* "*dilecto avunculo nostro Jacobo Stewart militi*." But before May 1477, he had been created Peer.—Evidence, Charter, Book viii. N. 35. *James III.* to the same *James Stewart* of that Date, "*noveritis quia alia nostri tenera in etate pro vera affectione quam habuimus et prout ad prefens habimus erga dilectum avunculum nostrum Jacobum Comitem de Buchane*."

HOME.

Home on the 2d August 1473. *Alexander Laird of Home* was created a Lord of Parliament, by the Title of Lord *Home*.—Evidence, Record of Parliament, Book ii. Folio 96. Certified Extract produced.

BOTHWELL.

Earl *Bothwell* was created in Parliament, 17th October 1488.—Evidence, Creation, Book iv. Vol. 93. of that Date produced.

AVONDALE.

Henry Stewart a younger Brother of Lord *Avondale*, married the Mother of *James V.* he was a Commoner on the 17th July 1528.—Evidence, Charter, Book xxii. N. 126. from *James V.* "*Carissime matri nostri Margaretæ Reginae Scotiae Henrico Stewart suo conjugi*." But he was created a Peer before the 20th September 1529.—Evidence, Charter, Book xxiii. N. 78. from *James V.* "*præfato consanguine nostro Henrico Domino Melboen*."—Record of Parliament, Book x. produced, in which on the 26th April 1532, Lord *Melboen* sits as Lord *Melboen* in Parliament.

BOYD.

Robert Boyd of *Glen* in the fifth Year of Queen *Mary's* Reign, was a Commoner.—Evidence, Charter of that Date. *Roberto Boyd* in the intermediate Time betwixt that and the 7th Year of the Queen's Reign, his Father, had been created Lord *Boyd*.—Evidence, Charter of that Date by Queen *Mary*, "*Sciatis nos, quandam cartam vitalis redditus facti consanguineum nostrum Robertum Magistrum de Boyd*."

BUCHAN

tion of the *Scotch* Constitution, because as Resignations of Peerages were in common Practice, so the Renewal of them was a common Act of Administration. Had these Creations by Regents been deemed contrary to the Royal Right, they would have been comprehended in some of the many Revocations made by several of the *Scotch* Kings, upon their attaining to Majority; but none such are to be found. The Reasoning from the Inability of a Regent to grant away the Crown Lands, to his Inability to grant a Peerage, is inadequate. The Objection to the granting away the King's Lands in his Minority, lay in its being hurtful to his Estate and Interest, who had only the Crown Lands and Feudal Casualties to support himself; but this does not apply to the Creation of Peers, which neither diminish the Estate nor Power of the Crown, but commonly prove Barriers to both. It appears also from the Act 133. Parliament 1431, referred to by Lady *Elizabeth*, that the Regent had, during the Minority of *James I.* given away Lands escheated to the Crown by Bastardy; and from a Revocation executed by *James V.* in *France*, upon his coming to Age, and afterwards ratified by Parliament, that Lands fallen to the Crown, and other Parts of the King's Estate, had been aliened by the Regent; and it is certain, that during the Minority of the Kings of *Scotland*, Parts of their Estates were often granted away, and never returned to the Crown, notwithstanding the usual Revocations when those Kings attain their Majority.

OBJECTION VIII.

Adam Gordon could not be Earl of *Sutherland* in the Year 1525, for in a Charter, 26 *March* that Year, he signs *Adam Gordon* simply; whereas *Elizabeth* signs Countess of *Sutherland*.

ANSWER.

This only proves the Ignorance or Inattention of the Person who led Earl *Adam's* Hand; for, at this Time being aged, and probably subject to some Malady, which rendered him incapable to write, he signs by a Notary, contrary to his usual Custom, but he is Twice named in the Body of the Deed, and both Times is styled Earl of *Sutherland*, and his Seal, which is appended, has the Words *Ade comes Sutherlandie* written round it.

OBJECTION IX.

It was objected by Mr. *Sutherland* of *Forse*, that *Elizabeth Sutherland's* Succession to her Brother *John's* Peerage could not be interrupted by her Brother *Alexander*, because *Alexander* was a Bastard.

PROOFS and AUTHORITIES.

BUCHAN.

Robert Douglas Brother Uterine to the Regent *James* Earl of *Murray* was a Commoner in 1563.—Evidence, Precept of Apprising, Privy Seal Records, Book xxxii. Fol. 34.—26th *December* 1563. by *James* Earl of *Murray* of Lands "quæ fuerunt Christinæ comitisse de *Buchan* et magistri *Roberti Douglas* ejus conjugis." But before *December* 1557, he sat in the *Scotch* Parliament as Earl of *Buchan*.—Evidence, *Anderson's* Collection, Vol. ii. p. 268. He also sat as Earl of *Buchan*, in Parliament Anno 1579.—Evidence, attested Roll of Parliament of that Year.

LENNOX.

Robert Stewart was created Earl of *Lennox*, by a Creation contained in a Royal Charter 26th *June* 1578. Book xxxv. N. 8. The Words are, "Nominamus creamus constituimus et ordinamus dictum dominum Robertum et hæredes suos su bseq. in comites dicti comitatus de *Levinax* ordinan. et volen. ut ipse et hæredes sui predicti dicto comitatu libertatibus privilegiis honoribus et dignitatibus ejusdem in Parlamento secreto consilio sessioni et omnibus aliis partibus ac alias ut congruit et uno comiti dicti nostri regni decet et adeo libere sicuti ulli alij comites de *Levinax* per prius usi sunt utantur gaudeant et possideant omni tempore a futuro absq; impedimenta quovismodo inde fien."

MARCH.

Robert Stewart was created Earl of *March* 25th *October* 1582.—Evidence, Charter, Book xxxv. N. 655. of that Date, in which the Creation is contained.

LENNOX.

Esme was created Duke of *Lenox*, 5th *August* 1581.—Evidence, Creation, certified Extract of Creation produced.

ARRAN.

James Stewart was created Earl of *Arran*, 22d *April* 1581.—Evidence, Charter of that Date, in which the Creation is contained. Extract produced.

ORKNEY.

Robert Stewart was created Earl of *Orkney*, 28th *October* 1581.—Evidence, Charter, Book xxxv. N. 494. of that Date, in which the Creation is contained. Extract, Charter of Creation produced.

STEWART.

Charles Stewart, Uncle to King *James VI.* was a Commoner on the 18th *April* 1572.—Evidence, Charter, Book xxxiii. N. 107. to him of that Date, in which he is several Times designed "Patruum nostrum Dominum Carolum Stewart." But from the Constitution of the Dukedom of *Lennox*, it appears he had been created Earl some Time betwixt that Period and the Year 1681.—Evidence, Constitution of the Dukedom of *Lennox*, 5th *August* 1581.

BUCHAN.

John Stewart Son to the Regent Duke of *Albany*, was a Commoner on the 12th *March* 1406.—Evidence, Charter, Roll of the Duke of *Albany*, 11th, N. 16. by his Father to him of that Date, "Filio nostro Joanni senescallo domino de *Buchan*." Charter, Roll 11th, N. 19. from the same to the same, 13th *May* 1407, in the same Terms. But on the 6th *November* 1413, he had been created a Peer.—Evidence, Charter, Roll 12. N. 27. of that Date, from the same to the same. "Filio nostro Joanni senescallo comite *Buchanie*."—Charter, Book ii. N. 30. by *James I.* 25th *February*, anno 1426. Joanni Stewart, comiti *Buchani*.

OCHILTREE.

Lord *Ochiltree* was created in Parliament on the 15th *March* 1542.—Evidence, Record of Parliament, Book x. Fol. 76. of that Date.

MARR.

James Stewart, afterwards Regent, was created Earl of *Marr* on the 7th *February* 1561.—Evidence, Privy Seal Records, Book 31st, Fol. ii. Certified Extract produced.

ANSWER.

It lies with Mr. Sutherland of Forfe, or Lady Elizabeth, to prove this Assertion; and yet they offer no Proof of it. But though it is not incumbent upon Sir Robert Gordon to prove a Negative, he can do it; for there is Evidence of Alexander's being legitimate. In Alexander's Renunciation of 24th July 1509, Earl John is said to be legitimate, and nearest Heir to his Father, Earl John. The Words are, "Et quod dictus Johannes ejus filius erat legitimus et propinquior hæres ejusdem Joannis comitis patris sui." After which, within Three Lines, follow these Words: "Et ex averfo comparuit Alexander Sutherland filius ETIAM dicti quondam comitis contra ipsum breve petitionemque dicti Johannis justanter cupiens quisque se in dicto comitatu jus hæreditarium habere, &c." Page 6. of this Case. The relative Word *etiam*, shows he was the lawful Son of the deceased Earl John, as much as his Brother, the then Earl John, who is described in the same Way: Both are put upon the same Foot; and there is no Contrast betwixt them, except as being both Competitors for the same Succession. Could a Bastard oppose the Claim of a legitimate Heir? Would Curators have been named to a Bastard maintaining such a Plea? Why take a Renunciation from a Bastard in so solemn a Manner, in the Presence of so many Persons of high Rank? Alexander renounces his Right. The Words are, "Juri suo in et ad dictum comitatum." But a Bastard could have no *jus suum* to renounce, because he had no *jus* at all. Why would Adam have given so considerable a Composition as an Annualrent of 40 Merks, to renounce his Right, if he had been a Bastard, who consequently had no Right to renounce? How came Alexander to reserve his own Right of Succession in the Estate, in case John or Elizabeth had no Issue? If he had been a Bastard, he had no Right of Succession to reserve. If Alexander had been a Bastard, how could he have brought a Reduction of his Brother's Service to their common Father? A great Number of Instruments show that he lived down to the 1519, and in these he is named, "Alexander Sutherland filius quondam Johannis comitis Sutherlandie," or, "Alexander Sutherland, Son to umquihill John Earl of Sutherland." But in no Instrument whatever, is he called *filius illegitimus* or illegitimate Son. The Presumption is always in favour of Legitimacy until the contrary is proved; so that the positive Proof, the negative Proof, and Presumption, all concur to show that he was lawful Son to Earl John, in *re tam antiqua*; there are very few Persons who could so completely prove the Legitimacy of an Ancestor.

OBJECTION X.

Objection x.

By *heredes sui*, in the most ancient Charters, were understood Heirs General, and not Heirs Male, to prove which two Charters are appealed to; one by King Robert Bruce, of the Earldom of Carrick, to his Brother Edward Bruce; the other of David II. of the Earldom of Ross to William Earl of Ross, both of which are *heredibus masculis*, which shows that *heredes sui* and *heredes masculi* were opposed to each other.

ANSWER.

Answer.

The legal Meaning of the Terms *heredes sui* at different Periods, has been already shewn. The two Instances only show that the former of these two Charters used the Words *heredes masculi*, instead of *heredes sui*, as deeming them to be synonymous. It is the same Thing as if, in modern Times, two Conveyancers naming the eldest Son of a Marriage, one should in the Conveyance call him the eldest Son of the Marriage, and the other should call him the Heir Male of the Marriage; but both would mean the same Thing, though they used different Terms.

REASONS of Preference for Sir Robert Gordon, in Competition with Mr. Sutherland of Forfe.

REASON I.

Reasons in Competition with Mr. Sutherland of Forfe.

As the late Earl of Sutherland, and all his Ancestors, up to Earl Adam Gordon, have, for 250 Years back, been in the uninterrupted and uncontroverted Possession of the Peerage of Sutherland as Heirs Male to Earl Adam: And as Mr. Sutherland, or his Ancestors, never made their Claim as Heirs Male to that Peerage, so the Length of Time, the Possession of one Party, and the Dereliction of the other, have stamp'd the Right of the former, and defaced the pretended Right of the latter. Most of the ancient Peerages of England, Scotland, and indeed of all Europe, have no better Foundation. Was a contrary Rule to be admitted; were Peers, at the Distance of 250 Years, or 2500 Years, (for Mr. Sutherland's Argument will go the Length of both) put to prove the Right of their Ancestor, and to defend themselves against People who pretended that, many Centuries back, their Ancestors had been defrauded, although none of their Posterity had ever complained of the Fraud till now, two Consequences would follow; the one that the Rights of One-half of the present Peers possessed of ancient Peerages would be unhinged; the other that such a Door would be opened to Forgery of Writings and Perjury of Witnesses for supporting such pretended or imaginary Claims, as would be dreadful in Prospect. But to avoid these Consequences, as well as to prevent the Peerage from swelling by obsolete Claims, the Law justly determines, that when one has been in Possession for Centuries, and the other has not claimed for Centuries, the Right of the former is good, and the latter is extinct for ever. If dormant Peerages are allowed to start up, at the Distance of Centuries, it surely can never be at the Expence of those who have enjoyed them for Centuries.

REASON II.

Reason II.

This Argument holds particularly in Scotland, where the Act 1617 declares the Roman Law, of the Forty Years positive Prescription, to be the Law of Scotland, as to all heretable Rights, corporeal or incorporeal. In the Question of Precedency between the Earls Sutherland and Crawfurd, in the Year 1706, the Court of Session found, that this Statute was to regulate Questions concerning Peerage Precedencies; which were then the Question before the Court. One of the Parties long maintained, that the positive Prescription could not at all regulate Questions concerning Peerages. But when the Court found otherways, he was so much satisfied he had been in the Wrong, that, when he brought the Judgment under Review, he did not impugn the Principle of Prescription, but only objected to the Extent the Court had carried it to.

OBJECTION.

Objection.

However immemorial Possession, or the positive Prescription of Forty Years, may operate upon Questions of Right, they cannot operate upon the Quality of Blood: The Rule of Law being, "Quod nullo tempore jura sanguinis dirimi possunt." And therefore, Claims of Blood are revivable at any Distance of Time.

ANSWER.

A N S W E R.

Answer.

It is not easy to distinguish betwixt the Rights of Men, and the Quality of Blood, which gives such Rights; for they are the same. If it be true (which is doubted) that a Family, who have not asserted their Qualities of Blood for Centuries, may assert them at any Time, this can only be, where no other Family has been in Possession of that Right of Blood, which they mean to assert: For, if one Party has been in the uncontroverted Possession for 250 Years, and the other has made no Claim for 250 Years, it would be most unjust to allow the former to be disturbed; and most just, that the other be obliged to continue his Silence for ever.

R E A S O N III.

Reason III.

It is certain, that Peerages frequently passed from one Family to another by Resignation, new Grant, Patent, or Act of Creation by the Crown, and even upon a Consent given by the Heir entitled to succeed. Such Resignation and Consent must be presumed, after so long an Enjoyment by *Adam Gordon* and his Heirs without Challenge.

R E A S O N IV.

Mr. *Sutherland*, of *Forse*, has failed in the Proof of his Propinquity: There are two Defects in his Proof.

D E F E C T I.

Defect I.

There is no legal or conclusive Evidence proving that *John Sutherland*, (N. 2. of the Pedigree annexed to Mr. *Sutherland* of *Forse*'s Case) as Son and Heir of *Kenneth Sutherland*, under the Addition or Description of "Son and Heir to *John Sutherland* of *Forse*," granted a perpetual Annuity of Forty Shillings of Silver, out of his Lands of *Drummoy*, to the Chaplain of *St. Andrews* Chapel of *Golfpie*.

A N S W E R.

It appears that *Robert* Earl of *Sutherland* granted, in 1400, to his Brother *Kenneth* the Lands of *Drummoy*; and that the same *Kenneth Sutherland* acquired the Lands of *Forse* in 1408; and it is supposed that Mr. *Sutherland* of *Forse* means to argue, that as the Lands of *Drummoy* and *Forse* belonged to *Kenneth*, it must be presumed that *John* got the Lands of *Forse* by Descent from his supposed Father *Kenneth*; and that *Richard* likewise got the Lands of *Drummoy* by Descent from his Father, or supposed Grandfather.

R E P L Y.

But this is neither legal, conclusive, nor satisfactory Evidence; for *John* might acquire the Lands of *Forse*, by Purchase or Gift; and *Richard* get the Lands of *Drummoy* the same Way, or his Father *John* might acquire them; and the Presumption in Law is, that they did acquire by Purchase; unless Mr. *Sutherland* of *Forse* produces Evidence that *John* and *Richard* took by Descent from *Kenneth*.—In short, the Evidence referred to only proves, that the Lands of *Forse*, which appear to have been the Property of *John*, and the Lands of *Drummoy*, which were the Property of *Richard*, did once belong to *Kenneth*; but that can never make out that *John* was the Son of *Kenneth*.

D E F E C T II.

Altho' the Writings produced for proving that *Richard Sutherland*, (N. 5. in the Pedigree) was the Grandson and Heir of *John* his Grandfather, do prove the Fact; yet they do not prove, that he was a Grandson by a Son, which is incumbent upon Mr. *Sutherland* of *Forse*, as he claims under the Character of Heir Male.—*Richard* might be the Grandson and Heir of *John* by a Daughter.

A N S W E R.

The Answer suggested in the Case to this Objection is, That as the Lands of *Drummoy* were originally granted by Earl *Robert*, to his Brother *Kenneth*, and his Heirs Male, whom failing, to return to the Granter and his Heirs; the Lands would have returned to the Family, had the Heirs Male of the Granter failed.

R E P L Y.

But this Answer is insufficient, being grounded upon an Hypothesis of the Lands having come from *Kenneth*, N. i. to *John*, N. ii. or *Richard*, N. iii. by Descent, and that the Investitures were to Heirs Male, when the Succession was taken up by *Richard*, N. v. the Grandson of *John*, N. iv. neither of which Facts are proved. The Clause of Return did not hinder *Kenneth*, N. i. to sell the Lands, and they might have been conveyed to the Purchaser and his Heirs whatever, and consequently would descend to *Richard*, N. v. the Grandson of *John*, N. iv. by a Daughter.

A N S W E R II.

Mr. *Sutherland*, in the last Paragraph but one of his Case, has stated the special Retour of *Alexander*, N. ix. as Heir to *William*, his Grandfather's Brother, in the Lands of *Drummoy*; and says, that as the Retour bears him to be Heir, *ratione tallie*, the original Grant in 1400 must be meant.

R E P L Y II.

As by the Retour, *Alexander* is served Heir in special to *William*, who died last seised of the Lands; the Entail referred to must either have been an Investiture of *William*'s, or a Deed executed by him. The Grant of 1400 could not be meant, unless *William* had taken the Lands as Heir of the original Grantee, which he certainly did not; as it is proved in the Case, that he took the Lands as Heir to his Brother *Richard*. 2do, The Grant of 1400 could not with any Propriety be called an Entail, and it had been absurd to have referred to it, by any Name in the Special Retour.

A N S W E R III.

Mr. *Sutherland* has likewise stated a Charter, by the Earl of *Caithness* in 1613, to *Alexander*, of the Lands

Lands of *Forse*, wherein he is said to be descended from *Kenneth*, the original Grantee from the Earls of *Marshall*.

R E P L Y III.

3d Reply.

This Charter is granted by the Earl of *Caitbness*, who, at that Time, had become Superior of the Lands by Purchase from the Family of *Marisball*; and if Mr. *Sutherland* founds upon this Charter, as Evidence of his being lineally descended from *Kenneth*, the Answer is, That no Credit can be given to it. The Story is introduced into the Charter by Way of Narration, and probably proceeded from Vanity in the Grantee. The Superior could have no Knowledge of the Fact, which was 200 Years old; he had no Interest to controvert the Allegation; it was not the Intention of the Charter to ascertain the Descent; and as the Fact is only stated narratively, without being grounded on any Kind of Evidence, no Kind of Credit can be given to that Part of the Instrument.

REASONS of Preference for Sir *Robert Gordon* in Competition with Lady *Elizabeth Wemyss*.

Reasons in Competition with Lady *Elizabeth Wemyss*.

The Claimant is at a Loss to guess what Argument peculiar to herself Lady *Elizabeth Wemyss* can use against his Succession to this Peerage: She is an Heir Female exactly in the same Predicament with Lady *Elizabeth Sutherland*, and can have no better Right.—She may indeed pretend to stand in a more favourable Light, as by the late Earl's Contract of Marriage, her Right to the Estate (if it ever opens to her by the Death of her Niece without Issue) is made to depend upon her Right to the Peerage. But the Law is deaf to such Considerations of Favour. If her own Brother who made the one depend upon the other, was deaf to them, she cannot wonder that the Law should be so too. But as Lady *Elizabeth Wemyss* denies her Brother's Power to make such Settlement, and contends, that by *prior ones* he was disabled from disappointing the Heir Female, there is not even a Shadow of Ground for this Plea of Favour.

Upon the whole, it is humbly hoped that the foresaid Dignity will be declared of Right to belong to the Claimant, Sir *Robert Gordon*, and his Heirs Male.

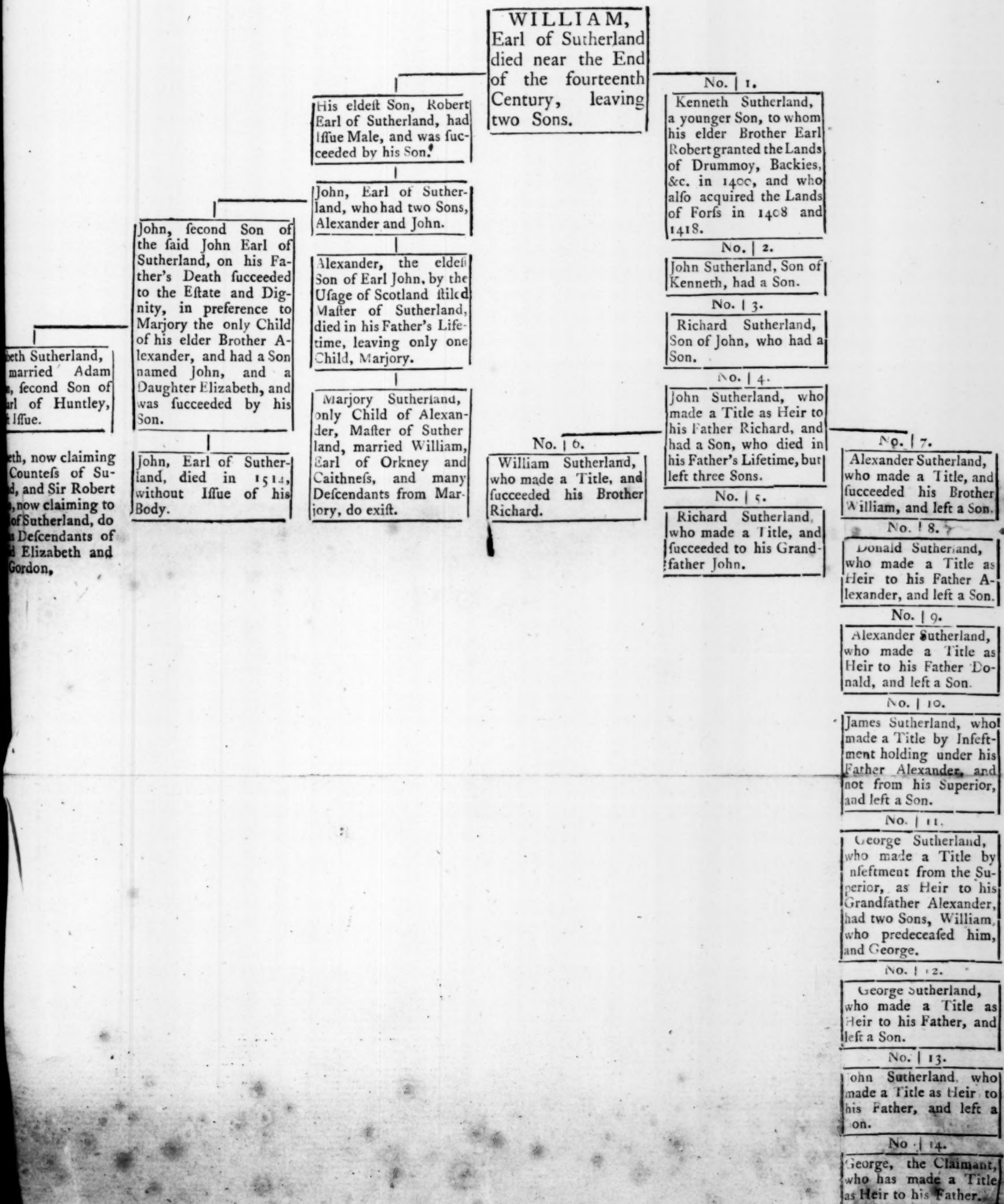
JA. MONTGOMERY.
AL. FORRESTER.
JOHN DALRYMPLE.
THO^S. LOCKHART.

P E D I G R E E

OF THE CLAIMANT

GEORGE SUTHERLAND of Forss, Esq;

As set forth by himself in his Case of last Year.



U. S. N. A. L. I. C. E. S.

THE NATIONAL L. I. C. E. S.

OF THE NATIONAL L. I. C. E. S.

OF THE NATIONAL L. I. C. E. S.



U. S. N. A. L. I. C. E. S.

SUPPLEMENTAL CASE

OF

ROBERT GORDON, Baronet,

(Claiming the Title and Dignity of)

EARL of SUTHERLAND.

To be heard at the Bar of the House of Lords,
before the Committee of Privileges, the
Day of 1770.